(8)

No. 84-231-ASX
Status: GRANTED

Title: Alvin D. Hooper and Mary N. Hooper, Appellants
v.
Bernalillo County Assessor

Docketed:
August 9, 1984

Court: Court of Appeals of New Mexico

Counsel for appellant: Folley, Harold L.

Counsel for appellee: Farr III, H. Bartow

Entry	Date	Note	Proceedings and Orders
1	Aug 9 1984	G	Statement as to jurisdiction filed.
2	Sep 8 1984		Motion of appellee Bernalillo County Assessor to dismiss or affirm filed.
5	Sep 12 1984		DISTRIBUTED. October 5, 1984
6	Oct 9 1984		PROBABLE JURISDICTION NOTED.
			**********
7	Oct 19 1984	G	Motion of the parties to dispense with printing the joint appendix filed.
8	Oct 29 1984		Motion of the parties to dispense with printing the joint appendix GRANTED.
9	Nov 16 1984		Brief of appellants Alvin D. Hooper, et ux. filed.
11	Dec 10 1984		Order extending time to file brief of appellee on the merits until December 29, 1984.
12	Dec 28 1984		Brief of appellee Bernalillo County Assessor filed.
13	Dec 28 1984		Brief amicus curiae of New Mexico filed.
14	Dec 29 1984	G	Motion of American Legion, et al. for leave to file a brief as amici curiae filed.
15	Jan 4 1985		SET FOR ARGUMENT. Wednesday, February 20, 1985. (3rd case.)
16	Jan 10 1985		CIRCULATED.
17	Jan 14 1985		Motion of American Legion, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
18	Jan 26 1985		Record filed.
19	Feb 7 1985	X	Reply brief of appellants Alvin D. Hooper, et ux. filed.
20	Feb 20 1985		ARGUED.

84-231

CASE NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALVIN D. HOOPER AND MARY N. HOOPER,
APPELLANTS

VS.

BERNALILLO COUNTY ASSESSOR,
APPELLEE

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

Lawrence S. Greher
P. O. Box 481
Brookside, NJ 07926
(212) 669-2774
Counsel for Appellants

80 pp

QUESTIONS PRESENTED BY THIS APPEAL

1. Whether a statutory scheme by which a State grants a continuing tax exemption to veterans who became residents of the State before a specified, fixed date but permanently denies such an exemption to otherwise qualified veterans who became residents after that date violates the constitutional rights of the newer resident-veterans with respect to equal protection, due process and the right to travel or migrate interstate?

2. Whether a State may, in the context of a tax-related statute, impose a residency requirement which permanently divides citizens of that State into two classes, one of which is perpetually denied a tax benefit which is granted to the other on a continuing basis?

3. Whether a State may, in conferring a continuing benefit on military veterans, impose, in addition to a bona fide residency requirement, another residency requirement unrelated to residency during the period of military service?

4. Whether there is a violation of State citizenship, secured by Section 1 of the 14th Amendment, when a fixed-date residency requirement is used, not as a test of the legitimacy of a claim of citizenship, but rather as a device to perpetually deny equal treatment to newer residents?

5. Whether, if found invalid, the residency requirement of paragraph C(3)(d) of N.M. Stat. Ann. § 7-37-5 (1978) (as amended) can be severed from the remainder of that statute?

PARTIES TO PROCEEDINGS BELOW

Alvin D. Hooper and Mary N. Hooper were the plaintiffs-appellants-petitioners and the Bernalillo County Assessor was the defendant-appellee-respondent in all proceedings below in the administrative agency and the Courts of New Mexico.

The Taxation and Revenue Department of the State of New Mexico, the American Legion and the Veterans of Foreign Wars were amicus curiae in the proceedings below in the Courts of New Mexico.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

REPORTS OF OPINIONS BELOW

Hooper v. Bernalillo County Assessor, ___ N.M. ___, 679 P.2d 840 (N.M.App.1984); cert. denied, ___ N.M. ___, 678 P.2d 705 (1984).

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

This is an appeal from the Supreme Court of New Mexico which rejected appellants' challenge to a State statute which requires residency in New Mexico prior to May 8, 1976 in order to qualify for a veteran's tax exemption. Appellants challenged that statute as repugnant to their equal protection and due process rights secured by Section 1 of the 14th Amendment of the United States Constitution and their constitutionally protected right to travel or migrate interstate.

Appellants' challenge to the statute was initially rejected by the Court of Appeals of New Mexico in a decision and order entered March 22, 1984 (App. B). In its decision and order of April 10, 1984 (App. A), the Supreme Court of New

Mexico let stand, and effectively adopted, the decision of the Court of Appeals of New Mexico by its denial of appellants' petition for writ of certiorari to review that decision. Appellants' motion for rehearing of that petition (App. D) was filed with the Supreme Court of New Mexico on April 23, 1984. That motion was not acted upon and was therefore deemed denied by the Supreme Court of New Mexico on May 23, 1984. N.M.Sup.Ct.R.19, R.App.Proc. for Civ. Cases & R.Gov.Orig.Proc. in Sup.Ct., Jud.Pamp.7, Repl.Pamp.1984.

Appellants' notice of appeal to this Court was filed on July 12, 1984 in the Supreme Court of New Mexico and on July 13, 1984 in the Court of Appeals of New Mexico and copies thereof were served upon all parties to the proceedings below (App. E).

This Court has jurisdiction under 28 U.S.C. §1257(2) to hear this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A veteran's tax exemption is authorized by Article VIII, Section 5 of the New Mexico Constitution and is implemented through N.M. Stat. Ann. § 7-37-5 (1978) (as amended). Appellants believe the implementing statute, particularly paragraph C(3)(d) thereof, offends Section 1 of the 14th Amendment to the United States Constitution and the right to travel or migrate interstate which is guaranteed by that Constitution.

These constitutional provisions and statute are set forth below.

(i) SECTION 1 OF FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, §1.

(ii) ARTICLE VIII, SECTION 5 OF THE CONSTITUTION OF THE STATE OF NEW MEXICO

The legislature may exempt from taxation property of each head of the family to the amount of two hundred dollars ($200) and the property, including the community or joint property of husband and wife, of every honorably discharged member of the armed

forces of the United States who served in such armed forces during any period in which they were or are engaged in armed conflict under orders of the president of the United States, and the widow or widower of every such honorably discharged member of the armed forces of the United States, in the sum of two thousand dollars ($2,000). Provided, that in every case where exemption is claimed on the ground of the claimant's having served with the armed forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property upon which exemption is claimed, shall be upon the claimart. N.M. Const. art. VIII, §5 (as amended Nov. 3, 1914, Sept. 20, 1921, Sept. 20, 1949, Sept. 15, 1953, and Nov. 6, 1973).

(iii) NEW MEXICO STATUTES, SECTION 7-37-5

A. Two thousand dollars ($2,000) of the taxable value of property, including the community or joint property of husband and wife, subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse if the veteran or surviving spouse is a New Mexico resident. The exemption shall be deducted from taxable value of property to determine net taxable value of property.

B. The veteran exemption shall be applied only if claimed and allowed in accordance with Section 7-38-17 NMSA 1978 and regulations of the division.

C. As used in this section, "veteran" means an individual who:

(1) has been honorably discharged from membership in the armed

forces of the United States;

(2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and

(3) was a New Mexico resident prior to:

(a) January 1, 1934, if the period of armed conflict during which the person served was during World War I or any conflict prior to that time;

(b) January 1, 1947, if the period of armed conflict during which the person served was World War II or any other conflict prior to that time but subsequent to the ending of hostilities of World War I;

(c) February 1, 1955, if the

period of armed conflict during which the person served was the Korean conflict; or

(d) May 8, 1976, if the period of armed conflict during which the person served was the Vietnam conflict.

D. For the purposes of Subsection C of this section, a person is considered a New Mexico resident prior to January 1, 1947 if, prior to that date, he lived in an area within the external boundaries of New Mexico that was then under the exclusive jurisdiction of the United States but became and continued to be a resident of New Mexico after cession of jurisdiction back to the state.

E. For the purposes of Subsection C of this section, a person who would otherwise be entitled to status as a

veteran except for failure to have served in the armed forces continuously for ninety days is considered to have met that qualification if he served during the applicable period for less than ninety days and the reason for not having served for ninety days was a discharge brought about by service-connected disablement.

F. For the purposes of Paragraph (1) of Subsection C of this section, a person has been "honorably discharged" unless he received either a dishonorable discharge or a discharge for misconduct. N.M. Stat. Ann. § 7-37-5 (1978) (as amended).

STATEMENT OF THE CASE

The material facts of this case are simple and undisputed. They are stated in the first two paragraphs of the opinion of the Court of Appeals of New Mexico (App. B 2-3).

Appellants jointly own real property subject to taxation in Bernalillo County, New Mexico. Appellant, Alvin D. Hooper, served in the armed forces during the specified time period, for a sufficient length of time, and received an honorable discharge as required by N.M. Stat. Ann. § 7-37-5 (1978) (as amended) in order to qualify for a veteran's tax exemption as a Vietnam era veteran. Appellants became bona fide residents of New Mexico on August 17, 1981. Appellants applied to the Bernalillo County Assessor ("Assessor") for a veteran's exemption with respect

to their 1983 property taxes. This application was denied by the Assessor solely because appellants had not established residency in New Mexico prior to May 8, 1976, as required by paragraph C(3)(d) of N.M. Stat. Ann. § 7-37-5 (1978) (as amended).

The Assessor's denial was protested and appealed by appellants to the Bernalillo County Valuation Protests Board ("Board") which upheld the Assessor's denial following a hearing (App. C).

Appellants appealed the Assessor's and Board's denials to the Court of Appeals of the State of New Mexico. That Court affirmed the Assessor's and Board's denials and held that the residency requirement of paragraph C(3)(d) of the statute was valid and did not violate appellants' equal protection

or due process rights or their right to travel or migrate interstate (App. B).

The Supreme Court of New Mexico denied appellants' timely-filed petition for a writ of certiorari to review the decision of the Court of Appeals of New Mexico and denied their timely-filed motion for rehearing of that petition, thereby effectively adopting the decision and order of the Court of Appeals of New Mexico.

Questions 1-4 regarding the validity of the challenged statute were first raised in appellants' February 4, 1983 letter to the Assessor protesting his denial of their claim for a veteran's tax exemption and petitioning for a hearing of that denial before the Board. The questions were again raised in oral argument before the Board in its

hearing of the petition. The decision and order of the Board did not explicitly address the questions, but its denial of the petition required an implicit decision that the statute did not violate appellants' equal protection or due process rights or right to travel.

These questions were again raised in the proceedings before the Court of Appeals of the State of New Mexico. The questions were raised in the briefs filed with that Court and in the oral argument before that Court and were recognized by that Court as the issues before it (App. B 3-4). The Court of Appeals of the State of New Mexico specifically held that the residency requirement of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) was valid and did not violate the equal protection rights (App. B 4-19) or the

due process rights (App. B 19-22) of appellants guaranteed by the 14th Amendment of the United States Constitution and did not unconstitutionally burden their right to travel or migrate (App. B 6).

These questions were further raised in appellants' petition for writ of certiorari filed in the Supreme Court of New Mexico. That Court's denial of that petition and the motion for rehearing effectively adopted the decision and order of the Court of Appeals of the State of New Mexico regarding the questions.

Question 5 regarding severance of the challenged part of the statute was first raised in the oral argument before the Board. It was subsequently raised in the briefs and oral argument before the Court of Appeals of the State of New

Mexico. Neither the Board nor that Court addressed this question in view of their decisions upholding the validity of the statute.

IMPORTANCE OF QUESTIONS PRESENTED

The questions presented by this appeal are substantial. The actions of the Legislature and the Courts of New Mexico in implementing and upholding the residency requirement of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) do violence to the thrust of this Court's decisions regarding residency requirements which can be imposed by a State as a condition for receipt of benefits provided to its citizens. The thrust of these decisions is that State citizenship, and the rights that flow therefrom as guaranteed by the United States Constitution, equates only with simple residence in the absence of compelling State interests and there are no degrees of citizenship in this regard. Yet the Legislature and the Courts of New Mexico have created and

are trying to maintain two permanent classes of resident-veterans in New Mexico which enjoy substantially different citizenship rights or benefits based solely on the date of establishing residence. The statute involved here contains a bona fide residency requirement in paragraph A thereof. The additional fixed-date residency requirement of paragraph C(3)(d) which is challenged herein is simply another manifestation of the provincial thinking that older or earlier residents are somehow more worthy than newer residents. This is the very evil that the equal protection right was intended to proscribe.

This Court has previously rejected lengthy durational residency requirements as inconsistent with the constitutional right to free interstate

migration and the right to equal protection. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). This Court has also rejected residency requirements which based the amount of a benefit on the length of residency. Zobel v. Williams, 457 U.S. 55 (1982). Further, this Court has found that the imposition of illogical and unreasonable conditions such as irrebuttable presumptions with respect to residency violates due process rights guaranteed by the 14th Amendment. Vlandis v. Kline, 412 U.S. 441 (1973).

This Court has not previously examined a fixed-date residency requirement such as the one here in issue which creates a perpetual disparity between two classes of

citizens of a State solely on the basis of the date of residency. Nevertheless, this fixed-date residency requirement raises the same concerns with regard to equal protection, due process and the right to travel or migrate that were raised by the other types of residency requirements which this Court has invalidated. It is noteworthy that contemporaneously with the action of the Courts of New Mexico in denying appellants' challenge to the fixed-date residency requirement, the Supreme Court of Alaska was unanimously invalidating a statute containing such a requirement. Schafer v. Vest, 680 P.2d 1169 (Alas. 1984).

The Court of Appeals of the State of New Mexico relied heavily on the fact that the residency requirement in

question specifies a fixed-date rather than a duration or length (App. B 9, 17-18). Once it was determined that this residency requirement did not fit the exact mold of those residency requirements previously struck down by this Court, the Courts of New Mexico showed little concern for the actual effects of the residency requirement. Such reasoning relies on form to the exclusion of substance.

The fixed-date residency requirement here in issue is even more onerous than those residency requirements already invalidated by this Court in that, unlike a durational residency requirement, it forever denies equal access to a continuing State benefit. Unlike the residency requirement invalidated in Zobel v. Williams, 457 U.S. 55 (1982),

it denies the entire benefit regardless of length of residency. It is also more insidious in that it allows the Legislature to arbitrarily pick and choose on a long-term basis those residents who will receive the benefit. This arbitrariness is clearly illustrated by the action of the New Mexico Legislature in 1983 when the fixed date specified in the statute was changed from May 8, 1975 to May 8, 1976.

If this residency requirement is allowed to stand, nothing would prevent a State from easily circumventing this Court's prohibition against lengthy durational residency requirements by utilizing a fixed-date residency requirement and periodically modifying the specified fixed date, as was done on at least one occasion. If this fixed-date residency requirement is

allowed to stand, nothing would prevent a State from reserving the best schools, libraries and parks, the best civil service jobs, etc., to those who became residents before the specified date. This Court has clearly ruled that a similar result based upon length of residency would be impermissible. Zobel v. Williams, supra, 457 U.S., at 64. It is equally impermissible when based upon the date of residency.

The Court below stated several reasons to support the validity of the residency requirement. These reasons are challenged in the questions presented for review. One such reason was that the denial of a veteran's tax exemption is not of sufficient significance to create any recognizable burden on the constitutional rights of those

denied the benefit (App. B 6-8). The veteran's tax exemption is not a one-shot benefit. It can continue perpetually for the class of residents who qualify under the fixed-date residency requirement and thus can provide annual tax exemptions which may amount to tens of thousands of dollars over a lifetime for a member of that class. On the other hand, this benefit is perpetually denied to members of the second class who are disqualified by the fixed-date residency requirement. This veteran's tax exemption clearly appears as significant as the dividend distribution or even the welfare and medical benefits with which this Court was concerned in the cases it has examined with respect to other forms of residency requirements. Furthermore, the veteran's tax exemption is of sufficient

importance to be specifically addressed in the State Constitution.

Another reason advanced in support of the residency requirement was that a legislature has substantial freedom in the context of tax legislation to implement classifications (App. B 18-19). However, none of the cited authority addresses, and this Court has never addressed, the extent of such freedom when a classification for tax purposes is based solely upon a date of residency. Regan v. Taxation With Representation of Washington, Nos. 81-2338, 82-134, slip op.; 103 S.Ct. 1997 (1983), does not involve classifications based on a residency requirement and thus was erroneously relied on by the Court below. Classifying property or income or organizations for tax purposes is vastly

different from classifying bona fide State citizens based solely on their date of residency.

Still another reason advanced in support of the residency requirement was that a "...state's interest in expressing gratitude and rewarding its own citizens for honorable military service..." provides a rational basis for the fixed-date residency requirement (App. B 15). The residency requirement herein does not require residency during the period of military service and thus the foregoing reasoning is nothing more than the prohibited rationale that the older or earlier residents should get more. This Court has not previously examined the extent to which a State may go in parceling out veterans' benefits based on residency requirements, particularly when those requirements do

not relate to the actual period of military service.

This Court should not be deterred from accepting this appeal, and resolving the questions presented, by the failure of the Supreme Court of New Mexico to address the questions on their merits in its denial of appellants' petition for writ of certiorari. That petition clearly set forth more than adequate grounds for granting such writ, including the importance of the questions. As stated by the Court of Appeals of New Mexico in its Order Re Filing of Amicus Briefs dated January 19, 1984 (App. F), the questions presented are "...of general importance to the citizens of this State and to military veterans specifically...". As indicated above, the Supreme Court of Alaska also recently considered

questions raised by a fixed-date residency requirement to be of substantial importance when it examined and invalidated such a requirement. Schafer v. Vest, 680 P.2d 1169 (Alas. 1984).

Although the facts of this case specifically involve only paragraph C(3)(d) of N.M. Stat. Ann. § 7-37-5 (1978) (as amended) relating to Vietnam era veterans, the decision of the questions presented herein will have a direct impact on the validity of paragraphs C(3)(a)-(c) of that statute which contain substantially similar residency requirements regarding World War I, World War II and Korean conflict veterans. Accordingly, every vete an now living in, or subsequently migrating to, New Mexico is directly affected by the resolution of these questions, as

each such veteran is either granted or denied a tax exemption based on this statute.

CONCLUSION

This case presents substantial constitutional questions regarding equality of State citizenship, due process and the right to travel. State citizenship and the rights associated therewith are guaranteed under the United States Constitution. Residency requirements which burden those rights and perpetually deny equal status to acknowledged bona fide residents are invalid unless they can withstand strict scrutiny.

This case is novel in the type of residency requirement presented. However, the unconstitutionality of that requirement is clear when the appropriate standard is applied. To allow the decisions of the Courts of New Mexico to stand would deal a serious blow to the fundamental concepts of

equal citizenship, due process and free interstate travel.

Accordingly, this Court is respectfully requested to accept this appeal and resolve the questions presented.

Respectfully submitted,

Lawrence S. Greher
Attorney for Appellants
P. O. Box 481
Brookside, NJ 07926
(212) 669-2774

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Tuesday, April 10, 1984

NO. 15,378

ALVIN D. and MARY N. HOOPER,

Petitioners,

vs.

BERNALILLO COUNTY ASSESSOR,

Respondent.

PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 7307 is hereby

returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

Filed and entered March 22, 1984

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ALVIN D. and MARY N. HOOPER,

Appellants,

vs.

BERNALILLO COUNTY ASSESSOR,

Appellee.

No. 7307

APPEAL FROM DECISION AND ORDER OF BERNALILLO COUNTY VALUATION PROTESTS BOARD

ALVIN D. and MARY N. HOOPER
Albuquerque, NM
Appellants Pro Se

KENNETH A. HUNT
Albuquerque, NM
for Appellee

PAUL BARDACKE
Attorney General
BRIDGET A. JACOBER
Assistant Attorney General
Santa Fe, NM
for Amicus Curiae
New Mexico Taxation and
Revenue Deprtment

DAVID GREER
Albuquerque, NM
for Amicus Curiae
American Legion and
Veterans of Foreign Wars

OPINION

MINZNER, Judge

The Bernalillo County Assessor ("Assessor") denied Appellants Alvin D. and Mary N. Hooper ("collectively referred to as Hooper") claim for a veteran's exemption under NMSA 1978, Section 7-37-5(C)(3)(d) (Repl.Pamp. 1983). The statute exempts $2,000.00 of the taxable value of property for any honorably discharged Vietnam veteran who served on active duty for at least ninety days and who was a New Mexico resident prior to May 8, 1976. Following a hearing, the Bernalillo County Valuation Protests Board ("Board") upheld the Assessor's denial. Hooper appeals pursuant to NMSA 1978, Section 7-38-28(A) (Repl.Pamp.1983).

The facts are undisputed. Hooper owns real property subject to taxation

in Bernalillo County. Alvin D. Hooper served in the armed forces on active duty in Vietnam for a sufficient length of time under Section 7-37-5(C)(2). He received an honorable discharge. The claim for an exemption was denied solely because he did not establish residency in New Mexico until August 17, 1981.

Hooper raises three issues on appeal:

(1) Whether the statutorily enacted residency requirement for qualification for the veterans exemption violates the equal protection clauses of both the United States and New Mexico Constitutions;

(2) Whether the statutorily enacted residency requirement for qualification for the veterans exemption violates the due process clauses of both the United States

and New Mexico Constitutions; and

(3) Whether, if invalid, the residency requirement can be severed from the exemption statute.

We affirm the Assessor's and Board's denial of the exemption and hold that the residency requirement is valid. Thus, we do not reach the third issue.

EQUAL PROTECTION

Section 7-37-5(C)(3)(d) separates all Vietnam veteran New Mexico residents into two classes: a class of veterans who became residents prior to May 8, 1976, and are entitled to the exemption; and a class of veterans who became residents subsequent to May 7, 1976, and are not entitled to the exemption. Alvin D. Hooper is a member of the latter class, to which the statute denies a benefit.

When a statute is challenged on

equal protection grounds, we must determine the appropriate standard of review. Our courts have interpreted the equal protection clause of the New Mexico Constitution consistently with federal court interpretations of the equal protection clause in the United States Constitution. Anaconda Co. v. Property Tax Department, 94 N.M. 202, 608 P.2d 514 (Ct.App.1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980). A classification scheme which impinges on a fundamental right or discriminates against a suspect class is constitutionally defensible only if it furthers a compelling state interest. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Hooper urges this court to find the statute unconstitutional on the ground that it penalizes Vietnam era veterans

who have exercised their fundamental right to travel and is not supported by a compelling state interest. Because in our judgment the statute does not unconstitutionally burden the right to travel, we decline to apply such a standard.

All residency requirements to some degree burden those who exercise the right to travel. Decisions recognizing the importance of that right, such as Shapiro v. Thompson, 394 U.S. 618 (1969), were never intended to cast doubt on the validity of all residency requirements. Dunn v. Blumstein, 405 U.S. 330, 342, n. 13 (1972). Furthermore, not every statute which has an adverse impact on a person who has exercised the right to travel is subject to strict scrutiny:

> The amount of impact required to give rise to

> the compelling-state-interest test was not made clear [in Shapiro]. The Court spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration.... Second, the Court considered the extent to which the residence requirement served to penalize the exercise of the right to travel.

Memorial Hospital v. Maricopa County, 415 U.S. 250, 256-57 (1974) (emphasis in original).

Section 7-37-5(C)(3)(d) does not unconstitutionally penalize an exercise of the right to travel. Courts that have applied the stricter standard of review to statutes because they abridged the right to travel have done so with respect to such fundamental interests as voting, welfare benefits, or public medical assistance. Cf. Hawaii Boating Association v. Water Transportation Facilities, 651 F.2d 661 (9th Cir.1981)

(court found durational residency requirements for preferential recreational rates did not impose a significant penalty on fundamental right to travel). Such rights are aspects of state citizenship now recognized in every state in some form. Denying such rights to new citizens even temporarily would penalize new residents and deter migration because those persons who contemplate moving interstate have reasonable expectations that such necessary, essential rights will be available. A veteran's property tax exemption is not such a right.

Hooper has argued that the value of the right is irrelevant. Hooper cites Zobel v. Williams, 457 U.S. 55 (1982), which found that the Alaska dividend program denied new residents equal protection, for the proposition that

denial of a benefit that has relatively small pecuniary value may be a sufficient penalty on the right to travel. Zobel did not decide whether the program merited strict scrutiny and thus did not alter the test established by Memorial Hospital.

Courts have held unconstitutional a substantial waiting period imposed on new residents as a qualification for benefits. Cf. Lambert v. Wentworth, 423 A.2d 527 (Me.1980) (court struck a ten-year residency requirement as an unconstitutional penalty on those veterans who have recently exercised their right to travel). That is not the case before us. Section 7-37-5(C)(3)(d) grants a tax exemption for veterans on the basis of residency established prior to a certain date. Such a legislative decision does not deny equal protection

unless it lacks a rational basis. Id.

A legislative classification must be reasonable, not arbitrary, and must rest upon some ground of difference that has a fair and substantial relation to the object of the legislation. McGeehan v. Bunch. The legislature enjoys a wide field of choice in creating classifications. Shope v. Don Coe Construction Co., 92 N.M. 508, 590 P.2d 656 (Ct.App.1979). In taxation, even more than in other fields, the legislature possesses the greatest freedom in classification. Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969). "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy." Allied

Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959).

When evaluated in light of this standard, we find that the New Mexico veterans exemption reflects legitimate state purposes and that Section 7-37-5(C)(3)(d) bears a reasonable relationship to those purposes. The people of the state first adopted the veterans exemption as Article 8, Section 5 of the New Mexico Constitution, in September 1921. The constitutional provision is not self-executing. It requires implementing legislation by the legislature in order to become effective. Cf. State ex rel. Delgado v. Romero, 17 N.M. 81, 124 P. 649 (1912).

The legislature first enacted a veterans exemption statute in 1923. That enactment contained both a residency and a thirty-day service

requirement, neither of which is contained in the constitutional provision. Chapter 130, Laws of 1923, codified in NMSA 1941, § 76-111. The legislature amended the statute in 1933 to provide that the claimant's residency must be acquired prior to January 1, 1934. Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946).

In Flaska, the court addressed the intent of the exemption. The court found that the people had adopted a plan to reward New Mexico veterans which could be made to apply to soldiers of any war, past or future, and had given the legislature continuing and permanent discretion to modify qualification criteria. Although the court recognized that the legislature might grant a tax exemption to every honorably discharged veteran of any war, the court implicitly

recognized the propriety of a less expansive exemption under the state constitution. The court deferred to the legislature for a solution to the problem that the requirement of residency prior to 1934 might exclude some World War II veterans:

> Perhaps some soldiers who live in and entered military service from New Mexico and served during the present war will be denied benefit of the exemption because of the requirement that residence in the state must have been acquired before 1934 to be eligible for the bounty.... If it sees fit to do so, the legislature has authority to act again...to meet and provide for conditions which may have grown up since the exemption statute in question was passed.

51 N.M. at 26, 177 P.2d at 182. In Flaska, the court assumed that the 1934 residency requirement was valid; the appellant satisfied the requirement.

The legislature has since amended the statute to provide specific residency date requirements for veterans of each major conflict in which the United States has been engaged since the exemption was originally adopted. In each instance, cutoff dates allow a veteran to qualify for the exemption if he establishes residency in New Mexico within a grace period following the official end of the conflict. NMSA 1978, § 7-37-5 (Cum.Supp.1983).

The question before us is whether the legislature acted arbitrarily or capriciously in either establishing a cutoff date or in adopting this specific cutoff date for veterans of the Vietnam war. Our courts have recognized the legislative classification based wholly upon the time element is invalid where the time selected has no reasonable

relation to the object of the legislation. State v. Sunset Ditch Co., 48 N.M. 17, 145 P.2d 219 (1944). That is not the case here.

The legislature has acted reasonably in exercising its discretion under the state constitution. A state's interest in expressing gratitude and rewarding its own citizens for honorable military service is a rational basis for veterans' preferences. Langston v. Levitt, 425 F.Supp. 642 (S.D.N.Y.1977); August v. Bronstein, 369 F.Supp. 190 (S.D.N.Y.1974), aff'd, 417 U.S. 901 (1974). The residency requirement at issue extends the benefit to any Vietnam veteran who was a resident prior to induction, who became a resident after induction but before his active tour of duty, or who became a resident within one year of the final U.S. troop

withdrawal. The scheme affords any Vietnam veteran a reasonable opportunity to establish New Mexico residency and qualify, and the one-year period, of which Hooper is critical, is actually a grace period that the legislature gratuitously provided. Cf., Lambert v. Wentworth (sustaining a requirement of residency at the time of induction).

That the legislature chooses to reward a specific class of veterans does not require it to extend the benefit to all veterans where the distinguishing residency criteria is rational. See Horst v. Guy, 211 N.W.2d 723 (N.D.1973); Miller v. Board of County Commissioners of Natrona County, 337 P.2d 262 (Wyo.1959). The legislature is entitled to reward and encourage veterans to settle in New Mexico, but it is also entitled to limit the period of time

within which they may choose to establish residency. See Miller. The fact that the legislature might have furthered its purpose more completely or more equitably does not invalidate the classification. East Texas Guidance & Achievement Center, Inc. v. Brockette, 431 F.Supp. 231 (E.D.Tex.1977).

Hooper argues that the specific date chosen, May 8, 1976, is completely arbitrary, pointing to the fact that the 1983 legislature changed the cutoff date from May 8, 1975 to May 8, 1976. Although any date chosen would be, to some extent, arbitrary, the legislature has enacted a statute which allows Vietnam veterans additional time to establish or re-establish New Mexico residency. The legislature has provided a comparable period for veterans of World War II and of the Korean

conflict. Classification based upon the particular cutoff date is reasonably related to the object of the legislation.

Zobel v. Williams, upon which Hooper relies, is distinguishable. There, the court struck down a classification scheme which extended a governmental benefit to all bona fide residents but conditioned the amount of the benefit on duration of residence. Finding that the classification scheme "creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State" (457 U.S. at 59), the court rejected Alaska's interests in support of such a scheme as insufficient.

The statute at issue here extends a tax benefit not to all bona fide residents, but to a small class of New

Mexico veteran residents. Unlike Zobel, the statute at issue here involves tax legislation and requires us to recognize an even broader legislative freedom in classification. Regan v. Taxation With Representation of Washington, ___ U.S. ___, 103 S.Ct. 1997, ___ L.Ed.2d ___ (1983). This classification scheme does not favor long-term residents as a class over those who have recently exercised their right to travel. It is not a true durational residency requirement which courts have disfavored. Zobel v. Williams; Lambert v. Wentworth. The legislature here extended a benefit to a specific class of New Mexico veteran residents in a manner that is rationally related to legitimate state interests.

DUE PROCESS

Hooper next contends that the

statute denies a constitutional right to due process because it is so vague or uncertain that persons of common intelligence must necessarily guess at its meaning. Hooper points out that the statute is unclear as to whether the requirement at issue is a continuous residency requirement and that a veteran with only one day of New Mexico residency, immediately followed by an extended period of nonresidency prior to May 8, 1976, might qualify for the exemption where Alvin D. Hooper does not.

Such arguments are not, standing alone, sufficient to allow this court to consider the issues raised. The exemption was not denied on either ground raised in support of this position. Hooper does not have standing to challenge the statute on the due process grounds of vagueness raised, and

we decline to issue an advisory opinion on the matter. Advance Loan Co. v. Kovach, 79 N.M. 509, 445 P.2d 386 (1968); Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923).

Hooper also argues that the statute fails to satisfy due process requirements because there is no rational basis to deny the tax exemption here because other veterans with fewer or less significant contacts with New Mexico could qualify. The fact that the legislature chooses to address an issue in such a manner that absolute equality is not realized does not require this court to strike the classification on due process grounds. Albuquerque Metropolitan Arroyo Flood Control Authority v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Because we find that the statutory

classification is constitutional, we need not consider the issue of severance raised by Hooper. The decisions of the Assessor and the Board are affirmed.

IT IS SO ORDERED.

/s/ Pamela B. Minzner
PAMELA B. MINZNER, JUDGE

WE CONCUR:

/s/ Thomas A. Donnelly
THOMAS A. DONNELLY, CHIEF JUDGE

/s/ C. Fincher Neal
C. FINCHER NEAL, JUDGE

APPENDIX C

Entered June 14, 1983

BEFORE THE BERNALILLO COUNTY VALUATION PROTESTS BOARD

IN THE MATTER OF THE PROTEST OF ALVIN D. AND MARY N. HOOPER.

PROTEST NO. 83-185

DECISION AND ORDER

This matter came on for hearing before the Bernalillo County Valuation Protests Board (hereinater called the "Board") on May 17, 1983. All applicable statutes; Property Tax Division regulations; arguments; and, all the evidence presented at the hearing were fully considered by the Board, and the Board being fully informed in the premises, finds as follows:

1. The Board has jurisdiction of the subject matter and parties.

2. The property owner was fully

informed as to all statutes and Property Tax Division regulations governing procedures before the Board and was further informed as to the method of valuation used by the Bernalillo County Assessor in determining the value of the subject property.

3. The valuation of the property is not protested herein. The property owner protests the denial of a veteran's exemption of $2,000.00 on the grounds that § 7-37-5 N.M.S.A. 1978 (as amended) is unconstitutional.

4. The Taxpayer admitted, by his own testimony, that he did not become a resident of New Mexico until 1981.

5. Conclusion. The Board finds that the property owner is claiming a veteran's exemption on the basis of service during the Viet Nam conflict, and concludes that the statute, § 7-37-5

(c)(1)[sic](d) N.M.S.A. 1978 (as amended), is conclusive as to a requirement of residence in New Mexico prior to May 8, 1976 for Viet Nam conflict veterans.

6. The Board concludes that the valuation as determined by the County Assessor is in accordance with the law, is supported by substantial evidence in the record taken as a whole and is not arbitrary, capricious or an abuse of discretion.

Additional reasons for the Decision and Order of the Board, if any are: None.

The Board therefore orders that no change be made in the 1983 valuation records of the Bernalillo County Assessor with respect to the following described property:

T10NR04E Section 35 LT17 BL44
Four Hills Village Eleventh

Installment; New Code Number
1-023-055-382-110-41108

The Board directs the County Assesor to take appropriate action to carry out this Order.

DONE THIS 14th day of June, 1983.

/s/ Michael T. Pino
MICHAEL T. PINO, CHAIRMAN
Bernalillo County Vauation
Protests Board

I, Michael T. Pino, Chairman of the Board, certify that I sent, by certified mail, a copy of this Order to the above named property owner, or his representative, at the following address, Alvin D. and Mary N. Hooper 1712 Pedregoso Place SE, Albuquerque, New Mexico 87123, the County Assessor and the Director of this Division on this 14th day of June, 1983.

/s/ Michael T. Pino
MICHAEL T. PINO, CHAIRMAN

APPENDIX D

Filed April 23, 1984. Never acted upon by Court, therefore deemed denied as of May 23, 1984, pursuant to N.M.Sup.Ct.R. 19, R.App.Proc. for Civ. Cases & R.Gov. Orig.Proc. In Sup.Ct., Jud.Pamp.7, Repl.Pamp.1984.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ALVIN D. and MARY N. HOOPER,

Petitioner,

vs.

BERNALILLO COUNTY ASSESSOR,

Appellee.

No. 15378

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS IN DOCKET NO. 7307

COMES NOW Petitioner, by and through its attorney, and moves this Court for a rehearing of Petitioner's Petition for Writ of Certiorari, originally applied for by Petitioner, pro se, and as grounds therefor, states the following:

1. This Court has overlooked and misapprehended the compelling importance and interest of this case to the public and particularly to the resident military veterans in the state.

2. This Court has overlooked and misapprehended the direct conflict of the decision of the Court of Appeals with decisions of this Court and the United States Supreme Court.

3. This Court has overlooked and misapprehended the direct challenge which Petitioner has raised to the validity of the statute governing veterans' exemptions under both the United States and New Mexico Constitutions.

WHEREFORE, Petitioner prays this Court for a rehearing of his Petition for a writ of certiorari to the Court of

Appeals and a granting of that Petition.

Respectfully submitted,

/s/ Lawrence S. Greher

LAWRENCE. S. GREHER
1193 Bobcat Blvd., NE
Albuquerque, NM 87122
Attorney for Petitioner
(505)844-4165

APPENDIX E

Filed July 12, 1984, in Supreme Court of New Mexico. Filed July 13, 1984, in Court of Appeals of State of New Mexico.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ALVIN D. HOOPER and MARY N. HOOPER,

Appellants,

vs.

BERNALILLO COUNTY ASSESSOR,

Appellee.

No. 15378

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Appellants, Alvin D. Hooper and Mary N. Hooper, by and through their attorney, hereby given notice of appeal of this case to the Supreme Court of the United States.

2. The Supreme Court of the State of New Mexico let stand, and effectively adopted, the decision and order of the Court of Appeals of the State of New

Mexico in Docket No. 7307, filed and entered March 22, 1984, by its denial of Appellants' Petition for Writ of Certiorari, entered April 10, 1984. Appellants' Motion for Rehearing of Petition for Writ of Certiorari, which was filed in this Court on April 23, 1984, was never acted on by this Court and was therefore deemed denied as of May 23, 1984 pursuant to Rule 19, New Mexico Supreme Court Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court. Judicial Pamphlet 7, Replacement Pamphlet 1984.

Appellants appeal from that decision and order of the Supreme Court of New Mexico and that decision and order of the Court of Appeals of the State of New Mexico which upheld the validity of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as

amended) as not violative of their equal protection rights and due process rights guaranteed by the 14th Amendment to the United States Constitution and their right of free interstate migration guaranteed by that Constitution.

3. This appeal to the Supreme Court of the United States is taken under 28 U.S.C. §1257(2).

Respectfully submitted,

/s/ Lawrence S. Greher

LAWRENCE S. GREHER
1193 Bobcat Blvd., NE
Albuquerque, NM 87122
Attorney for Appellants
(505) 844-4165

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served the foregoing Notice of Appeal to the Supreme Court of the United States have been served. I further certify that I made such service by depositing a copy of the foregoing document in a United States post office in Albuquerque, New Mexico, with first-class postage prepaid, addressed to each of the following on this 10th day of July, 1984.

Paul Bardacke, Esq.
Attorney General, State of
New Mexico
P. O. Drawer 1508
Bataan Memorial Building
Santa Fe, NM 87503

Bridget A. Jacober, Esq.
Assistant Attorney General
Taxation & Revenue Department
P. O. Box 630
Santa Fe, NM 87509-0630

Kenneth A. Hunt, Esq.
Attorney for Bernalillo
County Assessor
P. O. Box 26387
Albuquerque, NM 87125

David Greer, Esq.
Attorney for Amicus Curiae
American Legion
and Veterans of Foreign Wars
110 Quincy, NE
Albuquerque, NM 87108

I further certify that I deposited a copy of this Notice of Appeal to the Supreme Court of the United States in a United States post office in Albuquerque, New Mexico, with first-class postage prepaid, addressed to the Clerk, Court of Appeals of New Mexico, P. O. Box 2008, Supreme Court Building, Santa Fe, New Mexico, 87504-2004 on this 10th day of July, 1984 for filing with that Court.

/s/ Lawrence S. Greher
LAWRENCE S. GREHER
Attorney for Appellants

APPENDIX F

Filed and entered January 19, 1984

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ALVIN D. and MARY N. HOOPER,

Property Owner-Appellant,

v.

BERNALILLO COUNTY ASSESSOR,

Appellee.

No. 7307

ORDER RE FILING OF AMICUS BRIEFS

It appearing that appellant herein has challenged the constitutionality of NMSA 1978, Section 7-37-5(C)(3)(d), allowing a veterans tax exemption, and it further appearing that this issue is of general importance to the citizens of this State and to military veterans specifically; the following organizations are hereby invited to file an amicus brief with this Court addressing the issues raised by

appellant in this cause:

New Mexico Association of Counties
P. O. Box 1748
Santa Fe, NM

New Mexico State Bar, Taxation Section
P. O. Box 25883
Albuquerque, NM

Vietnam Veterans of New Mexico
833 Gibson, SE
Albuquerque, NM

Veterans of Foreign Wars
P. O. Box 8411
Albuquerque, NM

American Legion
1803 Carlisle, NE
Albuquerque, NM

American Civil Liberties Union
1330 San Pedro, NE
Albuquerque, NM

IT IS ORDERED that any of the above organizations may file an amicus brief with this Court, provided that they indicate by written notice filed with this court a desire to do so, on or before 31, January, 1984.

In the event any of the above entities desire to file amicus briefs

herein, they shall be filed with this Court on or before, the 20th day of February, 1984. Thereafter, Appellant and Appellee will be permitted to file responsive briefs ten (10) days thereafter on March 1, 1984.

Dated this 19th day of January, 1984.

/s/ Thomas A. Donnelly
THOMAS A. DONNELLY, CHIEF JUDGE

/s/ C. Fincher Neal
C. FINCHER NEAL, JUDGE

No. 84-231

IN THE

Supreme Court of the United States

October Term, 1983

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HUNTER L. GEER
P. O. Box 8248
Albuquerque, New Mexico 87198
(505) 266-5501
Counsel for Appellee

September 6, 1984

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

UNITED STATES CONSTITUTION

UNITED STATES STATUTES

NEW MEXICO STATUTES

No. 84-231

IN THE

Supreme Court of the United States

October Term, 1983

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COMES NOW the Appellee, and hereby moves this Court to dismiss the appeal, or in the alternative, to affirm the decision of the New Mexico Court of Appeals in *Hooper v. Bernalillo County Assessor*, ____N.M.____, 679 P.2d 840 (N.M. App. 1984); *cert. denied*, ____N.M.____, 678 P.2d 705 (1984), on the grounds that this Court lacks jurisdiction pursuant to 28 U.S.C. § 1257(2) or that no substantial federal question is raised by Appellants and the decision of the Court of Appeals is correct.

JURISDICTION

This appeal is improperly taken from the Supreme Court of the State of New Mexico, rather than the Court of Appeals of the State of New Mexico, because the Supreme Court of the State of New Mexico refused to grant certiorari. The "highest court" as set forth in 28 U.S.C. § 1257(2) is the Court of Appeals of the State of New Mexico. Therefore, this Court lacks jurisdiction to hear this appeal and it should be dismissed. (*See Michigan-Wisconsin Pipeline Company v. Calvert*, 347 U.S. 157, *reh. den.* 347 U.S. 931 (1954)).

STATEMENT OF THE CASE

The material facts asserted by Appellants are not challenged.

ARGUMENTS

INTRODUCTION

If this Court has jurisdiction to hear this appeal, then none of the issues presented by Appellants are substantial federal questions. Although violations of the Fourteenth Amendment have been asserted in the first four questions presented in the Jurisdictional Statement, the challenged legislation (§ 7-37-5 N.M.S.A. 1978, as amended, Appendix A herein) does not impact "basic necessities of life"; does not impact a fundamental interest or suspect classification; and does not impact an area of the law which is unsettled. Moreover, the fifth question presented in the Jurisdictional Statement on severability, is clearly not a federal question at all and was not so addressed in the lower courts. Therefore, that matter should be summarily disposed of by affirming the lower court's decision.

I. THE RESIDENCY REQUIREMENTS OF § 7-37-5 N.M.S.A. 1978, AS AMENDED, DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The principal basis of this appeal is the unconstitutionality of the residency requirements of the New Mexico statute as it is alleged to violate the Fourteenth Amendment, Equal Protection Clause. The residency requirements are twofold. First, at the time of claiming the veteran's exemption, one must be a "bonafide" New Mexico resident (§ 7-37-5A N.M.S.A. 1978, as amended.) (This requirement is not challenged by Appellants.) The second residency requirement provides for residency for a Vietnam era veteran prior to May 8, 1976. (§ 7-37-5C(3)(d) N.M.S.A. 1978, as amended).

Intrinsic to the resolution of the entire question of equal protection is the determination of what standard for review shall be applied, and secondly, whether that standard has been transgressed. *Dunn v. Blumstein*, 405 U.S. 330 (1972). In an equal protection context, the standard of review is mandated by the right which is alleged to be denied by operation of the statute. *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975). When legislation impacts a fundamental interest or involves a suspect classification (race, sex, age, etc.), that legislation is subject to "strict scrutiny". *McGeehan v. Bunch, supra.* But when the interest is not fundamental or the class is not suspect, all that is required is that there be a "rational and natural basis" for the difference in treatment of the two or more classes. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Langston v. Levitt*, 425 F. Supp. 642 (S.D.N.Y. 1977). There is no suspect classification involved in this case, and the only fundamental interest asserted by Appellants is the right to travel. Therefore, for the "strict scrutiny" test to apply, the

residency requirement of the New Mexico statute must abridge the right to travel.

In determining whether a residency requirement infringes on the right to travel, this Court classifies the requirements as durational or non-durational. A durational residency requirement provides that a person must reside within the jurisdiction for a specified length of time. *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Dunn v. Blumstein, supra.* All other residency requirements are deemed non-durational. Durational residency requirements can impair the fundamental right to travel while non-durational requirements cannot. *August v. Bronstein*, 369 F. Supp. 190 (S.D.N.Y. 1974), *aff'd* 417 U.S. 901 (1974). Statutes involving the receipt of veteran's benefits conditioned upon residency in a state at a fixed date in the past, i.e., at the date of induction into the military service and/or at the date of separation from the service, are non-durational residency requirements. (*See August v. Bronstein, supra* and *Langston v. Levitt, supra*). The New Mexico statute is analogous to the above situations, and does not infringe upon the fundamental right to travel.

In the cases cited by Appellants, *Shapiro, Dunn,* and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the claimants in each of those cases were denied benefits because they had not been residents for the length of time required by statute. Similarly, in *Zobel v. Williams*, 457 U.S. 55 (1982), claimants received benefits based on the length of time they had been residents of Alaska. The holdings of each of those cases involved durational residency requirements and are distinguishable from this case. The most recent authority of Appellants, *Schafer v. Vest*, 680 P.2d 1169 (Alaska 1984), principally turned upon the durational segment of the residency requirement to invalidate that statute.

Even if the residency requirement in this case was characterized as durational, it would still not interfere with the fundamental right to travel and violate the Equal Protection Clause. As noted in *Memorial Hospital v. Maricopa, supra,* the deprivation of a "basic necessity of life" or "vital government benefit" must coincide with an infringement of the right to travel for the Equal Protection Clause to be violated. A durational residency requirement does not imply a *per se* violation of the fundamental right to travel. The finding that the fundamental right to travel had been violated in *Shapiro, Dunn,* and *Memorial Hospital* resulted from the severity of the penalty intrinsic to the requirement. The benefits denied in the above cases because of lack of residency were essential to daily life – welfare benefits, the right to vote, and medical assistance for an indigent. This combination of a durational residency requirement and the denial of a benefit of vital importance triggered the finding that the fundamental right to travel was infringed. The veterans benefits granted by the legislation in question are clearly not so vital. Therefore, the fundamental right to travel is not infringed by the residency requirement of § 7-37-5C, and a fortiori any federal question raised by this appeal is *not* substantial.

In this case, necessarily the "strict scrutiny" test must yield to the "rational and natural basis" test in weighing the constitutionality of § 7-37-5 N.M.S.A. 1978, as amended. (*See City of New Orleans v. Dukes, supra; Allied Stores of Ohio v. Bowers, supra* and *Langston v. Levitt, supra*). The New Mexico veteran's exemption has a rational and natural basis which is neither arbitrary nor capricious. The purpose of § 7-37-5 N.M.S.A. 1978, as amended, is to reward persons who served in the military as residents of New Mexico during periods of armed conflict, or who chose to reside in New Mexico shortly after such periods. This goal has a "rational relationship to the State's legitimate interest". (*Langston v. Levitt, supra* at 648; *See also August v. Bronstein, supra; Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980); *Miller v. Board of County Commissioners*

of Natrona County, 337 P.2d 262 (Wyoming 1959)). The New Mexico Court of Appeals Opinion in this case stated:

> The legislature is entitled to reward and encourage veterans to settle in New Mexico, but it is also entitled to limit the period of time within which they may choose to establish residency . . . The fact that the legislature might have furthered its purpose more completely or more equitably does not invalidate the classification. (Citations omitted.) (Appendix to Jurisdictional Statement, B16 and B17.)

One of the most compelling reasons to dismiss this appeal is the great latitude provided states in matters of taxation. When no fundamental interest is impacted by taxation classifications (*Kahn v. Shevin*, 416 U.S. 351 (1974)) the challenging party must "negative every conceivable basis which might support the classification". (*Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). The Appellants failed to overcome such a burden in any of the lower court or administrative proceedings and have raised no new issues which should be considered by this Court in accepting this appeal. The grounds for this appeal are not substantial.

II. THE RESIDENCY REQUIREMENTS OF § 7-37-5 N.M.S.A. 1978, AS AMENDED, DO NOT VIOLATE THE DUE PROCESS CLAUSE OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The only due process arguments of Appellants relate to vagueness and the lack of a rational basis. (*See* New Mexico Court of Appeals Opinion, Appendix to Jurisdictional Statement, B19-B22). The latter issue is closely aligned with the previously discussed equal protection arguments, and the same grounds exist for dismissing the appeal as to due process. (*Patch Enterprises, Inc. v. McCall*, 447 F. Supp. 1075 (1978)).

Vagueness, on the other hand, was not addressed in the Jurisdictional Statement and should be deemed waived, or alternatively should be ignored because Appellants do not have standing. (*See* New Mexico Court of Appeals Opinion, Appendix to Jurisdictional Statement, B19-B22).

III. THE SEVERABILITY OF THE RESIDENCY REQUIREMENT IS NOT A FEDERAL QUESTION AND SHOULD NOT BE CONSIDERED.

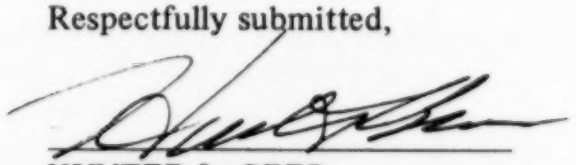
As stated previously, severability is not a federal question, and was not raised as a federal question in the lower courts or administrative proceedings. In light of the Court of Appeals of the State of New Mexico determining that § 7-37-5 N.M.S.A. 1978, as amended, was constitutional, the serverability argument did not have to be addressed at that level. If this Court decides that the statute is unconstitutional, as to its residency requirement, Appellee would ask that the matter be remanded to the Court of Appeals of the State of New Mexico to determine the severability question since it was not substantively decided previously.

CONCLUSION

The issues presented by Appellants are not substantial federal questions because they do not relate to fundamental interests or suspect classifications. The state is given great leeway in matters of taxation and because this statute has a rational basis it does not violate the Equal Protection or Due Process Clauses. Therefore, Appellee respectfully requests

this Court to dismiss the appeal, or in the alternative to affirm the lower court's decision.

Respectfully submitted,



HUNTER L. GEER
P. O. Box 8248
Albuquerque, New Mexico 87198
(505) 266-5501
Counsel for Appellee

September 6, 1984

APPENDIX A

§ 7-37-5 N.M.S.A. 1978, as Amended.

7-37-5. Veteran exemption.

A. Two thousand dollars ($2,000) of the taxable value of property, including the community or joint property of husband and wife, subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse if the veteran or surviving spouse is a New Mexico resident. The exemption shall be deducted from taxable value of property to determine net taxable value of property.

B. The veteran exemption shall be applied only if claimed and allowed in accordance with Section 7-38-17 NMSA 1978 and regulations of the division.

C. As used in this section, "veteran" means an individual who:

(1) has been honorably discharged from membership in the armed forces of the United States;

(2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and

(3) was a New Mexico resident prior to:

(a) January 1, 1934, if the period of armed conflict during which the person served was during World War I or any conflict prior to that time;

(b) January 1, 1947, if the period of armed conflict during which the person served was World War II or any other conflict prior to that time but subsequent to the ending of hostilities of World War I;

(c) February 1, 1955, if the period of armed conflict during which the person served was the Korean conflict; or

(d) May 8, 1976, if the period of armed conflict during which the person served was the Vietnam conflict.

D. For the purposes of Subsection C of this section, a person is considered a New Mexico resident prior to January 1, 1947 if, prior to that date, he lived in an area within the external boundaries of New Mexico that was then under the exclusive jurisdiction of the United States but became and continued to be a resident of New Mexico after cession of jurisdiction back to the state.

E. For the purposes of Subsection C of this section, a person who would otherwise be entitled to status as a veteran except for failure to have served in the armed forces continuously for ninety days is considered to have met that qualification if he served during the applicable period for less than ninety days and the reason for not having served for ninety days was a discharge brought about by service-connected disablement.

F. For the purposes of Paragraph (1) of Subsection C of this section, a person has been "honorably discharged" unless he received either a dishonorable discharge or a discharge for misconduct.

(3)

CASE NUMBER 84-231

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALVIN D. HOOPER AND MARY N. HOOPER,
APPELLANTS

VS.

BERNALILLO COUNTY ASSESSOR,
APPELLEE

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BRIEF OF APPELLANTS

Harold L. Folley
Counsel for Appellants
1743 Soplo, SE
Albuquerque, NM 87123
(505) 844-3269

99 pp

QUESTIONS PRESENTED

1. Whether a statutory scheme by which a State grants a continuing tax exemption to veterans who became residents of the State before a specified, fixed date but permanently denies such an exemption to otherwise qualified veterans who became residents after that date violates the constitutional rights of the newer resident-veterans with respect to equal protection, due process and the right to travel or migrate interstate?

2. Whether a State may, in the context of a tax-related statute, impose a residency requirement which permanently divides citizens of that State into two classes, one of which is perpetually denied a tax benefit which is granted to the other on a continuing basis?

3. Whether, in the distribution of benefits to its resident-veterans, a State may impose, in addition to a bona fide residency requirement, another residency requirement unrelated to residency during the period of military service?

4. Whether there is a violation of State citizenship rights, secured by Section 1 of the 14th Amendment, when a fixed-date residency requirement is used, not as a test of the legitimacy of a claim of citizenship, but rather as a device to perpetually deny equal treatment to newer citizens?

5. Whether, if found invalid, the residency requirement of paragraph C(3)(d) of N.M. Stat. Ann. § 7-37-5 (1978) (as amended) can be severed from the remainder of that statute?

PARTIES TO PROCEEDINGS BELOW

Alvin D. Hooper and Mary N. Hooper were the appellants and the Bernalillo County Assessor was the appellee in the proceedings in the Court of Appeals of the State of New Mexico whose judgment is sought to be reviewed herein.

The New Mexico Taxation and Revenue Department, the American Legion and the Veterans of Foreign Wars were amicus curiae in the proceedings in the Court of Appeals of the State of New Mexico.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CITATIONS TO OPINIONS AND JUDGMENTS BELOW

Hooper v. Bernalillo County Assessor, 101 N.M. 172, 679 P.2d 840 (Ct. App. 1984), cert. denied, 101 N.M. 77, 678 P.2d 705 (1984).

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

This is an appeal from the Court of Appeals of the State of New Mexico which rejected appellants' challenge to N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) which requires residency in New Mexico prior to May 8, 1976 in order to qualify as a Vietnam-era veteran for purposes of a tax exemption. Appellants challenged that statute as repugnant to their citizenship, equal protection and due process rights secured by Section 1 of the Fourteenth Amendment of the United States Constitution and their constitutionally protected right to travel or migrate interstate. Appellants' challenge to the statute was rejected by the Court of Appeals of New Mexico in a decision and order entered March 22, 1984 (J.S. App. B).

On April 4, 1984, appellants filed with the Supreme Court of New Mexico a timely petition for writ of certiorari to review the decision of the Court of Appeals of New Mexico. N.M. Sup. Ct. R. 28, R. App. Proc. for Civ. Cases & R. Gov. Orig. Proc. in Sup. Ct., Jud. Pamp. 7, Repl. Pamp. 1984. In its decision and order of April 10, 1984 (J.S. App. A), the Supreme Court of New Mexico denied the petition and let stand the decision of the Court of Appeals of New Mexico. Appellants' timely motion for rehearing of that petition (J.S. App. D) was filed with the Supreme Court of New Mexico on April 23, 1984. That motion was not acted upon and was therefore deemed denied by the Supreme Court of New Mexico on May 23, 1984. N.M. Sup. Ct. R. 19, R. App. Proc. for Civ. Cases & R. Gov. Orig. Proc. in Sup. Ct., Jud.

Pamp. 7, Repl. Pamp. 1984.

Appellants' notice of appeal to this Court was filed on July 12, 1984 in the Supreme Court of New Mexico and on July 13, 1984 in the Court of Appeals of the State of New Mexico (J.S. App. E). 28 U.S.C. §2101(c); Sup. Ct. R. 10, 11.

The appeal was docketed in this Court on August 9, 1984. Sup. Ct. R. 12.

This Court noted probable jurisdiction of this case on October 9, 1984.

This Court has jurisdiction under 28 U.S.C. §1257(2) (1982) to hear this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A veteran's tax exemption is authorized by article VIII, section 5 of the New Mexico Constitution and is implemented through N.M. Stat. Ann. § 7-37-5 (1978) (as amended). Appellants believe the implementing statute, particularly paragraph C(3)(d) thereof relating to Vietnam-era veterans, offends section 1 of the Fourteenth Amendment to the United States Constitution and the right to travel or migrate interstate which is guaranteed by that Constitution.

These constitutional provisions and statute are set forth in the Jurisdictional Statement, beginning on page 12 thereof.

STATEMENT OF THE CASE

The material facts of this case are simple and undisputed. They are stated in the first two paragraphs of the opinion of the Court of Appeals of New Mexico (J.S. App. B 2-3).

Appellants jointly own real property subject to taxation in Bernalillo County, New Mexico. Appellant, Alvin D. Hooper, served in the armed forces during the specified time period, for a sufficient length of time, and received an honorable discharge as required by N.M. Stat. Ann. § 7-37-5 (1978) (as amended) in order to qualify for a tax exemption as a Vietnam-era veteran. Appellants migrated to and became bona fide residents of New Mexico on August 17, 1981.

Appellants made timely application to the Bernalillo County Assessor

("Assessor") for a veteran's exemption with respect to their 1983 property taxes. This application was denied by the Assessor solely because appellants had not established residency in New Mexico prior to May 8, 1976, as required by paragraph C(3)(d) of N.M. Stat. Ann. § 7-37-5 (1978) in order to qualify as a "veteran."

The Assessor's denial was timely protested and appealed by appellants to the Bernalillo County Valuation Protests Board ("Board") which upheld the Assessor's denial following a hearing (J.S. App. C). N.M. Stat. Ann. § 7-38-24 to -27 (1978) (as amended).

Appellants timely appealed the Assessor's and Board's denials to the Court of Appeals of the State of New Mexico. N.M. Stat. Ann. § 7-38-28 (1978) (as amended). That Court

affirmed the Assessor's and Board's denials and held that the residency requirement of paragraph C(3)(d) of the statute was valid and did not violate appellants' equal protection and due process rights and their right to travel or migrate interstate (J.S. App. B 4, 7, 20).

The Supreme Court of New Mexico denied appellants' timely petition for a writ of certiorari to review the decision of the Court of Appeals of New Mexico (J.S. App. A) and denied their timely motion for rehearing of that petition (J.D. App. D), thereby letting stand the decision and order of the Court of Appeals of New Mexico. Appellants appealed the decision of the Court of Appeals of the State of New Mexico to this Court.

SUMMARY OF ARGUMENT

The fixed-date residency requirement set forth in N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended), which governs property tax exemptions for Vietnam-era veterans, is one of the most discriminatory residency requirements ever examined by this Court. It does not purport to be a test for bona fide residency in New Mexico--that test is contained in paragraph A of the statute and appellants are bona fide residents. This residency requirement instead divides New Mexico resident-veterans into two permanent classes based solely upon date of migration to the State and therefore is nothing more than a blatant attempt by New Mexico to reward its older or earlier resident-veterans and discriminate against its newer resident-veterans in the

distribution of publicly-funded benefits. The Fourteenth Amendment forbids such discriminatory apportionment of state benefits.

This residency requirement creates permanent classes of citizens in New Mexico which have substantially different citizenship rights and benefits based solely upon the date of exercise of the fundamental right to travel or migrate to that State. It is in effect a durational residency requirement of infinite length in that the waiting period for equality under this statute is forever. Perpetually determining a citizen's status based upon the date of exercise of a fundamental right clearly burdens that right and should trigger strict scrutiny of the requirement which creates the burden. The residency requirement

challenged here cannot be justified on any rational basis, much less withstand strict scrutiny. Further, in any balancing of interests, the important individual interests and the national interest in a free and fluid system of interstate movement clearly outweigh any interests of New Mexico in the challenged residency requirement.

The legitimate interests of New Mexico in assisting its citizen-veterans is not challenged nor is that State being challenged regarding its right to classify citizens in accordance with relevant and rational criteria. However, using an arbitrary date to divide its citizens into permanent conflicting classes is not a rational, nor permissible way for New Mexico to express interest in its citizens. Such action by New Mexico is so arbitrary and

unreasonable that it violates the due process and equal protection rights of those citizens disadvantaged by the classification.

New Mexico's freedom with respect to economic and tax legislation does not extend so far as to allow it to disregard fundamental national interests and the constitutional rights of its citizens. Even in tax legislation where no fundamental right is impacted, classifications must still be rational. A classification based on an arbitrary date is not rational.

For these reasons, the Court of Appeals of New Mexico should be reversed and the arbitrary residency requirement here in issue declared invalid and severed from the remainder of the New Mexico statute.

ARGUMENT

I. THE RESIDENCY REQUIREMENT CHALLENGED HEREIN IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE.

Article VIII, section 5 of the Constitution of New Mexico provides that:

> The legislature may exempt from taxation property...of every honorably discharged member of the armed forces of the United States who served in such armed forces during any period in which they were or are engaged in armed conflict under orders of the president of the United States,...in the sum of two thousand dollars ($2,000).

This provision (i) speaks of every honorably discharged veteran, not just a select class, (ii) contemplates service on behalf of the United States, not just New Mexico, and (iii) does not even mention residence.

This constitutional provision is implemented by N.M. Stat. Ann. § 7-37-5 (1978) (as amended), which provides in pertinent part:

> A. Two thousand dollars ($2,000) of the taxable value of property, including the community or joint property of husband and wife, subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran...if the veteran...is a New Mexico resident....
>
> . . . .
>
> C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to...(d) May 8, 1976, if the period of armed conflict during which the person served was the Vietnam conflict.

A brief history of these provisions is set forth in Appendix A hereto. It should be noted in this history that a date (May 8, 1975) was first added to paragraph C(3)(d) of the statute in

1981. 1981 N.M. Laws, ch. 187, §1. In 1983, after appellants had filed for the exemption, the statute was amended to substitute the present date of "1976" for "1975." 1983 N.M. Laws, ch. 330, §1. Both the May 8, 1975 and May 8, 1976 dates were designated by the New Mexico Legislature several years after these dates had passed. Thus, from its very conception, the residency requirement in paragraph C(3)(3) was obviously intended to benefit only the earlier or longer-term residents.

The enactment of these residency-date requirements had the immediate effect of dividing Vietnam-era veterans who were already living in and citizens of New Mexico into two permanent classes which received disparate treatment. For example, in 1981 a Vietnam-era veteran who had

migrated to New Mexico on May 7, 1975 suddenly became eligible for a tax exemption. However, the veteran who had migrated to New Mexico on May 8, 1975 was simultaneously told that he was not, and never would be, eligible for the exemption unless the legislature acted further. All veterans who first migrated to New Mexico after the specified date would forever share the second-class citizenship status of those citizen-veterans who had been disadvantaged immediately upon enactment of the residency requirement.

This statute includes two significant features. First, it includes in paragraph A both a requirement for a present bona fide residency and a requirement of veteran status. These requirements are not challenged. Secondly, in paragraph

C(3)(d) the statute arbitrarily adds an additional residency requirement or veteran-status requirement by defining "veteran" in terms of a fixed date (May 8, 1976 for Vietnam-era veterans) which has no real connection to the time period of military service or to the time period of any prior residence in New Mexico. This requirement is challenged herein.

The residence "prior to May 8, 1976" which qualifies one to be a "veteran" could range from a very short period to a long continuous period so long as any part occurred at any time prior to this fixed date. Continuous residence is not required. See 1963-64 Rep. of Att'y Gen. of N.M. 31 (Op. No. 63-13). The qualifying military service could have occurred before, during or after the period of qualifying prior residence.

The veteran who resided in New Mexico for only one week as an infant years ago could immediately qualify for the exemption upon resumption of residence at any time in the future regardless of where he or she had resided before, during or after military service. Thus, contrary to the reasoning of the Court of Appeals of New Mexico, there is no need for a "grace period" immediately following the war for "re-establishing" residence (J.S. App. B 17).

The additional fixed-date residency requirement of May 8, 1976 does not purport to classify or distinguish between veterans and non-veterans as is contemplated in article VIII, section 5 of the New Mexico Constitution. Such classifications or distinctions between veterans and non-veterans are permitted. Regan v. Taxation With

Representation of Washington, 461 U.S. 540, 103 S. Ct. 1997 (1983) (non-veterans organization engaged in lobbying activities properly may be denied a tax exemption status which is granted to veterans organization engaged in similar activities). See, e.g., 38 U.S.C. §101(2) (1982) (defines or distinguishes veterans from non-veterans for purposes of federal benefits). Rather, the fixed date creates arbitrary and permanent classifications of similarly-situated resident-veterans never contemplated in the New Mexico Constitution nor permitted by Section 1 of the Fourteenth Amendment to the United States Constitution.

The New Mexico statute distributes State veterans benefits unequally. There is no dispute that appellant, Alvin D. Hooper, meets all requirements

for a veteran's tax exemption set forth in both the constitutional provision and the statute, with the sole exception of the fixed-date requirement of paragraph C(3)(d) of the statute. (J.S. App. B 2-3). Yet appellant has been denied a benefit which is granted to similarly-situated New Mexico citizens who happened to reside in New Mexico prior to May 8, 1976.

As stated by this Court in Zobel v. Williams, 457 U.S. 55, 60 (1982), in striking down an Alaska dividend-distribution scheme which apportioned the amount of the dividend on length of residence:

> When a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it

makes rationally furthers a legitimate State purpose.

The provision challenged herein fails to survive even this minimum scrutiny.

A. REWARDING A SELECT CLASS OF VETERANS IN RECOGNITION OF PAST CONTRIBUTIONS IS NOT A LEGITIMATE STATE PURPOSE.

Only two state purposes or objectives were relied upon by the Court of Appeals of New Mexico to sustain the validity of the classification created by N.M. Stat. Ann. § 7-37-5C(3)(d). One purpose was stated as "[a] state's interest in expressing gratitude and rewarding its own citizens for honorable military service...." (J.S. App. B 15). (Also expressed as "a plan to reward New Mexico veterans...." (J.S. App. B 12)). By denying the tax exemption benefit to newer residents such as appellants, New Mexico clearly

is not "expressing gratitude and rewarding" that class of "its own citizens." Rather, New Mexico is apportioning the benefit only "to a small class of New Mexico veteran residents." (J.S. App. B 18-19). "Its own citizens" has been redefined by New Mexico as its earlier citizens whether or not they have even remained citizens of the State. Thus, the stated purpose dissolves into nothing more than a desire to reward a select class of earlier New Mexico residents for past contributions. That objective is not acceptable for at least two reasons.

First, this Court has specifically rejected a "past contributions" justification for the apportionment of benefits. In Zobel v. Williams, 457 U.S. 55, 63 (1982), this Court stated:

> The last of the State's objectives--to reward citizens for past contributions--...is not a legitimate state purpose. A similar "past contributions" argument was made and rejected in Shapiro v. Thompson, 394 U.S. at 632-633....

See id. at 68 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining, citing Vlandis v. Kline, 412 U.S. 441, 450 n. 6 (1973)).

The fact that the past contribution happens to be military service in no way changes the foregoing prohibition. This is particularly true when the past contributions of only a select group of earlier resident-veterans is recognized. As elaborated upon by the Court in Strong v. Collatos, 593 F.2d 420, 422 (1st Cir. 1979) (affirming a lower court's striking down of a Massachusetts three-year durational residency requirement for receipt of veteran's benefits):

Appellants' primary position is that the statute is part of a unique and elaborate state program of benefits to veterans reflecting a legitimate desire to reward Massachusetts citizens who have served their country in the armed forces. They urge that, since the program is a reward to a certain finite group, it is distinguishable from the Shapiro type of benefits which are needed for the basic necessities of life.

This argument simply does not wash....

. . . .

It is difficult to understand how these benefits are in any meaningful way distinguishable from the welfare aid involved in Shapiro. Nor can we conceive why veterans who have served the entire United States, including Massachusetts, are made worthier by waiting three years to become eligible for the benefits. The reward, we assume, is for serving in the armed forces, not for living in Massachusetts....

> What we have here is an attempt by Massachusetts to prefer its own residents...upon a time basis which is entirely arbitrary, and which at most could be said to have

> some relation to the prior contributions made by Massachusetts residents to the Commonwealth. But even if the time periods were not arbitrarily selected, it would not be constitutionally permissible for Massachusetts to make a right or privilege depend upon the mere fact that the recipient was one of Massachusetts' own people.... [Quoting Stevens v. Campbell, 332 F. Supp. 102, 106 (D. Mass. 1971) (three-judge court)].

See also Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971) (applied strict scrutiny test to strike down five-year residency requirement for veteran's preference and reasoned that military service is of general or national interest and a state does not have sufficient special interest to justify favoring its own citizens and penalizing the exercise of the fundamental right to migrate). This reasoning is persuasive with respect to

the challenged New Mexico residency requirement. "The basic predisposition to take care of one's own--and no one else's--is no longer a permissible goal for a state that has joined the federal union." Schafer v. Vest, 680 P.2d 1169, 1171 (Alaska 1984) (per curiam). This predisposition, based upon the provincial thinking that older or earlier residents are somehow more worthy, is the very evil that the equal protection right was intended to proscribe. Cole v. Housing Authority of Newport, 435 F.2d 807, 813 (1st Cir. 1970); Lambert v. Wentworth, 423 A.2d 527, 533 (Me. 1980). Reasoning to the contrary in cases such as Langston v. Levitt, 425 F. Supp. 642 (S.D.N.Y. 1977) (three-judge court) and August v. Bronstein, 369 F. Supp. 190 (S.D.N.Y. 1974) (three-judge court), aff'd, 417

U.S. 901 (1974), which approved preferential treatment of a state's "own veterans" (i.e., veterans whose residency and military service overlapped) is no longer persuasive, if it ever was, in view of Zobel v. Williams, 457 U.S. 55 (1982), and the reasoning of Strong v. Collatos, 593 F.2d 420 (1st Cir. 1979). "[S]ummary affirmance by this Court [in August] is not to be read as an adoption of the reasoning supporting the judgment under review." Zobel, 457 U.S. at 64 n. 13.

Secondly, assuming arguendo that past military service as a resident of New Mexico were otherwise a legitimate and sufficient past contribution, this statute must still fall. This statute requires no connection or overlap between time or date of residency and time or date of military service.

Supra, at 29-30. Accordingly, New Mexico cannot rely on a special nexus between military service and residency to show any rational connection between the residency requirement and the rewarding of "its own citizens for honorable military service...." (J.S. App. B 15).

B. THIS FIXED-DATE RESIDENCY REQUIREMENT IS NOT RATIONALLY RELATED TO THE OBJECTIVE OF ENCOURAGING VETERANS TO SETTLE IN NEW MEXICO.

The Court of Appeals of New Mexico stated that another purpose of the statute was "to reward and encourage veterans to settle in New Mexico...." (J.S. App. B 16). However, the court provided no insight for rationally linking that purpose to this challenged residency requirement. This Court considered and rejected a similar

asserted linkage in Zobel v. Williams, 457 U.S. 55, 61 (1982):

> [C]reating a financial incentive for individuals to establish and maintain Alaska residence...[is] not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959.

The incentive of a tax exemption should be equally attractive to all veterans and the denial of the incentive to veterans who had not migrated to New Mexico before May 8, 1976 might be considered an attempt by New Mexico to discourage such migration. Such an attempt should encounter insurmountable constitutional difficulties. Zobel, 457 U.S. at 62 n. 9; Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

This statute has a further fatal flaw with respect to this alleged purpose in that the previously-discussed

history of this challenged fixed-date residency requirement (Appendix A) shows the impossibility of it providing any basis for encouraging veterans to settle in New Mexico. When the New Mexico Legislature chose both the original date of May 8, 1975 and the amended date of May 8, 1976, those dates had long since passed. It is an impossibility to retroactively encourage the doing of an act before a date which has already passed. This is further compelling evidence of the lack of any rational connection between the fixed-date residency requirement and any legitimate state purpose.

C. A DATE OF RESIDENCE BY ITSELF IS NOT A RATIONAL BASIS FOR CLASSIFICATION OF STATE CITIZENS FOR RECEIPT OF BENEFITS.

The right of a state to impose a

requirement of a bona fide residency for receipt of publicly-funded benefits is without question. Martinez v. Bynum, 461 U.S. 321, 103 S. Ct. 1838 (1983) (a Texas statute requiring a bona fide residence in order to obtain tuition-free public school admission upheld). Further, the right of a state to make reasoned distinctions between its citizens based on relevant, neutral characteristics such as need is not challenged. Zobel v. Williams, 457 U.S. 55, 70 (1982) (Brennan J., concurring, with Marshall, Blackmun and Powell, JJ. joining). However, statutory provisions such as N.M. Stat. Ann. § 7-37-5(C)(3)(d) (1978) encounter constitutional prohibitions when they attempt to go further and classify concededly bona fide citizens of the state solely on the basis of an

arbitrary and irrelevnt characteristic such as date or length of residence.

The reasoning underlying the constitutional prohibitions against such classification is amplified in the concurring opinion of Justice Brennan in Zobel v. Williams, 475 U.S. 57, 69 (1982):

> But it is significant that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence. And the Equal Protection Clause would not tolerate such distinctions.

The foregoing reasoning is equally applicable when the "degrees of citizenship" are based on a date of establishing residence rather than a length of residence. That concurring opinion goes on to state:

> [W]e have never suggested that duration of residence vel non provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself.

Id. at 70. This reasoning likewise applies to discrimination based on date of residence.

Appellants do not contend that their Fourteenth Amendment citizenship rights require New Mexico to provide veterans tax exemptions in the first place. Instead, appellants simply assert that once New Mexico made that decision, its power to apportion that benefit is limited by Section 1 of the Fourteenth Amendment. This fundamental principle has long been recognized. Justice Miller stated in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873), that "a citizen of the United States

can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." In short, there can be no seniority or caste system insofar as citizenship and the rights associated therewith are concerned. Differences in treatment by a state of its citizens must at least bear a rational relationship to some relevant characteristic such as individual need. Different treatment based on arbitrary and irrelevant criteria is prohibited discrimination. This is particularly true when the disparate treatment is based on an arbitrary residency requirement which implicates the right to travel.

> [I]t is difficult to escape from the recognition that

> underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise and, I believe, implicitly rejected most forms of discrimination based upon length of residence, when we adopted the Equal Protection Clause.

Zobel, 457 U.S. at 71 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining). The specification of a date of residence rather than a period or a duration is a difference of form only, not of substance.

This Court in Zobel, 457 U.S. at 65, concluded that "Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then." Simply replacing "Alaska" with "New Mexico" and

"1959" with "May 8, 1976" in this quotation shows just how precisely the reasoning in Zobel applies to this case.

The Supreme Court of Alaska recently invalidated a statute containing a specified or fixed-date residency requirement on the basis that its examination of that statute was controlled by this Court's reasoning in Zobel v. Williams. In Schafer v. Vest, 680 P.2d 1169, 1170 (Alaska 1984) (per curiam), the Court invalidated an Alaska statute establishing a longevity bonus program which paid a monthly cash bonus to state residents who (i) were over 65, (ii) were domiciled in Alaska before it became a state (i.e., January 3, 1959), and (iii) had 25 years of continuous domicile. The reasoning of Chief Justice Burke in his concurring opinion

invalidating the statute is persuasive in this case. He states:

> Persons who were not domiciled in Alaska prior to January 3, 1959, are automatically and forever barred from sharing in the program's monetary benefit. Even those thus qualified must meet the additional requirement of 25 years of continuous domicile. Thus, the program applies only to a select class, for which one qualifies solely on the basis of the date of his or her arrival in Alaska, followed by a prescribed period of continuous domicile. I see no substantial relationship between these requirements and any legitimate state purpose.

Schafer, 680 P.2d at 1172. If New Mexico can automatically and for all time deny a veteran's benefit on the basis of the date of establishing residence, nothing would preclude it from arbitrarily denying access to public facilities, the best schools, public employment or any State-provided benefit on the same basis. It is hard

to imagine anything more destructive to the very fabric of our union and more alien to our fundamental concepts of equality than allowing a state to create such arbitrary and permanent classifications of its citizens.

D. THE SPECIFIED DATE OF RESIDENCY IS COMPLETELY ARBITRARY AND CANNOT BE THE BASIS FOR A RATIONAL CLASSIFICATION OF STATE CITIZENS.

The Court of Appeals of New Mexico concedes that any date chosen for the residency requirement "would be, to some extent, arbitrary...." (J.S. App. B 17). A date which to any extent is arbitrary is not an acceptable basis for classification of citizens. It cannot be both arbitrary and rational.

Even the Supreme Court of New Mexico has stated that classifications based solely on arbitrary dates are not

permissible. In State v. Sunset Ditch Co., 48 N.M. 17, 145 P.2d 219 (1944), that court invalidated a New Mexico statute which required a corporation organized before New Mexico became a state to file an annual report not required to be filed by corporations organized after that date. The court reasoned:

> Legislative classification based wholly upon [a] time element when the time selected has no reasonable relation to the object of the legislation has been held unreasonable and arbitrary, and repugnant to the 14th Amendment to the Federal Constitution.

Id. at 25, 145 P.2d at 223. The Court of Appeals of New Mexico failed to follow this precedent. (J.S. App. B 14-15).

New Mexico has no published legislative history to support any alleged purposes of the statutory classification other than those relied

upon by the Court of Appeals of New Mexico. Those purposes have already been discussed and demonstrated as not being legitimate or not being rationally related to the specified date. Supra, at 33-42. Thus, the originally-specified date of May 8, 1975 and the amended date of May 8, 1976 must be taken for what they are--purely arbitrary dates. The arbitrariness of the specified date is further illustrated by the action of the New Mexico Legislature in 1983 when it changed the previously-specified date of May 8, 1975 to May 8, 1976. 1983 N.M. Laws, ch. 330, §1. There cannot be a multitude of rational dates or times for the same purpose. The legislature could just as easily have chosen 1:39 PM on May 8, 1976. That would not be any more arbitrary.

The discriminatory effect of this arbitrary date of May 8, 1976 is graphically illustrated by the previously-mentioned example of two Vietnam-era veterans. Supra, at 27-28. New Mexico's interest in those two resident-veterans cannot rationally be so drastically different. The State's desire to reward its veterans cannot rationally be so dependent upon one day's difference in residency especially when the critical day has passed several years before it was chosen by the legislature. This is arbitrariness in its most brazen form.

II. THIS RESIDENCY REQUIREMENT IS IN EFFECT A PERPETUAL DURATIONAL REQUIREMENT WHICH CANNOT WITHSTAND THE REQUIRED STRICT SCRUTINY.

As discussed, the residency requirement of N.M. Stat. Ann.

§ 7-37-5C(3)(d) (1978) (as amended) cannot pass even the minimum rationality test. Assuming arguendo that it could pass that minimum test, that is not enough. Because of its impact on the fundamental right to migrate, the requirement should withstand strict scrutiny before it could be found valid. This requirement clearly cannot withstand that scrutiny.

A. THE SPECIFIED DATE IS IN EFFECT A DURATIONAL REQUIREMENT OF INFINITE LENGTH AND IS ONE OF THE MOST OPPRESSIVE RESIDENCY REQUIREMENTS EVER EXAMINED BY THIS COURT.

An examination must be made of the substance or effect as well as the form of the fixed-date requirement set forth in N.M. Stat. Ann. § 7-37-5C(3)(d) (1978). For Vietnam-era veterans migrating to New Mexico after May 7, 1976, that fixed-date requirement

operates exactly as a residency requirement of unlimited or infinite duration. Its effect is to divide bona fide resident-veterans into two permanent classes based solely on date of migration to New Mexico. Members of the later-arrriving class cannot hope to ever satisfy the residency requirement and attain equality with the members of the earlier-arriving class. Stated differently, the waiting period for equality under this statute is forever.

It would appear self-evident that a Vietnam-era veteran moving to New Mexico after May 7, 1976 would, if given a choice, prefer a ten- or even twenty-year durational residency requirement over a residency requirement which forever bars him or her from achieving equality with those similarly-situated veterans who arrived before that date.

Even with very long but finite durational requirements, the veteran can hope to one day achieve equality. There can be no such hope under this statute because it forever closes the door to "veteran" status for anyone whose residency is established after this fixed point in time, now more than eight years past. There seems little doubt that a ten- or twenty-year durational requirement would be invalid under such circumstances. It is less doubtful that a residency requirement which is even more onerous than these invalid durational residency requirements is also invalid.

In Zobel v. Williams, 457 U.S. 55 (1982), this Court struck down an Alaska statutory scheme which distributed a dividend to its citizens in varying amounts based upon the length or date of

residency of the recipients. This Court held that such a scheme of classifying state citizens did not meet the minimal rational basis test. Id. at 65. That invalid scheme was in effect the same as the scheme being challenged herein in that it divided the citizens of Alaska into permanent classes in which members of later-arriving classes could never achieve equality with the members of earlier-arriving classes. That is in essence an infinite or perpetual durational residency requirement in that the waiting period for equality is forever. It makes little difference to the person denied equality whether the invalid basis for the denial is expressed in terms of a fixed date or an unreasonable period of time.

The New Mexico statute differs from the invalid Alaska statute in that it

creates fewer classes and it either grants or denies the entire benefit. These distinctions merely sharpen the focus on the discriminatory effect of the New Mexico statute.

The effect of the residency requirement in denying a tax exemption to Vietnam-era veterans migrating to New Mexico on or after May 8, 1976 is neither temporary nor insignificant. It results in a year-after-year, perpetual denial of equality with respect to a substantial annual benefit which is granted to other similarly-situated veterans. It is hard to imagine a residency requirement which more blatantly challenges the fundamental right of free interstate migration or the concept of equality of citizenship set forth in Section 1 of the Fourteenth Amendment.

B. THIS RESIDENCY REQUIREMENT OF PERPETUAL DURATION IMPOSES A PENALTY ON THE FUNDAMENTAL RIGHT TO TRAVEL OR MIGRATE INTERSTATE AND MUST BE SUBJECTED TO STRICT SCRUTINY.

The federal or national interest in a free and fluid system of interstate travel and movement and the individual "right to travel" associated therewith have long been recognized even though their source is subject to debate. Zobel v. Williams, 457 U.S. 55, 60 n. 6 (1982); id. at 66-67 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining); id. at 72-73, 79-81 (O'Connor, J., concurring in the judgment). See Jones v. Helms, 452 U.S. 412, 417-19 and nn. 12 and 13 (1981); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); United States v. Guest, 383 U.S. 745, 757-59 (1966). The "right to travel" has two aspects--a more general right to travel to and through a

state and a more specific right to enter and establish residency within a state. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). These two aspects are often merged and undifferentiated. Both are fundamental to our union and a threat to one must be considered a threat to the other.

The essence of both aspects of the "right to travel" is stated in Zobel, 457 U.S. at 60 n. 6:

> In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer-term residents.

In this case it is clear that Vietnam-era veterans who have exercised their fundamental right to migrate to

and become citizens of New Mexico on or after May 8, 1976, are disadvantaged with respect to, and are treated differently from, longer-term residents (i.e., those simiarly-situated veterans who moved to New Mexico before May 8, 1976) solely because of the date on which they exercised their fundamental right. The citizenship right of the newcomers or later-arriving veterans is forever less valuable than that of the earlier resident-veterans or those arriving before May 8, 1976. A clearer case of a burden or penalty relating to the exercise of the right to travel would be difficult to imagine. See Cole v. Housing Authority of Newport, 435 F.2d 807, 810-11 (1st Cir. 1970).

This Court has held that no actual deterrence to travel or migration is required before a residency requirement

will be considered as penalizing or burdening the right to travel. As stated in Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972), any argument that actual deterrence is required "represents a fundamental misunderstanding of the law.... Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence." See Memorial Hospital v. Maricopa County, 415 U.S. 250, 257-58 (1974). The penalty results from how the newcomer is treated once he arrives, not on whether he was actually deterred. If the new resident is disadvantaged with respect to prior residents, the new resident is being penalized.

The classification of admittedly

bona fide resident-veterans into two classes, one of which is permanently disadvantaged or penalized on the basis of the date of exercise of the fundamental right to travel, can only be justified if there is a compelling state interest in the classification. Shapiro v. Thompson, 394 U.S. 618, 634 (1969), states that "any classification which serves to penalize the exercise of that right [right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." (Emphasis in original). See Memorial Hospital v. Maricopa County, 415 U.S. 250, 258 (1974); Dunn v. Blumstein, 405 U.S. 330, 339 (1972).

In Zobel v. Williams, 457 U.S. 55 (1982), this Court found that the residency requirement of the Alaska dividend statute did not even meet the

minimal rational purpose test and thus no decision regarding the appropriateness of enhanced or strict scrutiny was required. Zobel, 457 U.S. at 60, 65. However, four concurring Justices leave no doubt that "where the 'right to travel' is involved...it will trigger intensified equal protection scrutiny." Zobel, 457 U.S. at 66 n. 1 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining).

The New Mexico Court of Appeals held that appellants' right to travel has not been unconstitutionally implicated because the benefit involved here is not a fundamental interest or basic necessity of life. (J.S. App. B 7-8). Appellants have found no support for such reasoning in this Court's recent decisions invalidating residency requirements. On the contrary, this

Court in Zobel v. Williams, 457 U.S. at 64 n. 11, appears to disapprove any such rationale. The concurring opinion goes even further and specifically states that the right to travel "is clearly, though indirectly, affected by the Alaska dividend-distribution law...." Zobel, 457 U.S. at 66 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining). Yet, there was no finding in Zobel that the dividend distribution was a fundamental right or basic necessity of life, and its monetary value did not appear significantly different than that of the veterans tax exemption involved herein. Further, appellants in Zobel had been residents of Alaska for about two years and clearly had not been deterred from migrating there. Classifications are subject to strict scrutiny, not because

of the associated benefit, but because they "impinge[d] upon the fundamental right of interstate movement." Graham v. Richardson, 403 U.S. 365, 375 (1971). Accord Barnes v. Board of Trustees, Michigan Veterans Trust Fund, 369 F. Supp. 1327, 1335 (W.D. Mich. 1973) (three-judge court). Surely the State of New Mexico would not suggest that this Court should countenance "minor" encroachments on constitutionally-protected rights.

Even assuming arguendo that deprivation of a substantial right or benefit were required before strict scrutiny became applicable, such a benefit is involved in this case. A benefit which is of sufficient importance to be specifically authorized in the State Constitution, N.M. Const. art. VIII, §5, and which can amount to

several thousand dollars over a lifetime is clearly significant to most citizens.

The right to travel and migrate freely must, if it means anything, mandate that a new citizen of a state must within some rational time after arrival be treated equally with earlier residents. Permanent distinctions between citizens based solely on the time of exercising the fundamental right to migrate to and establish citizenship within New Mexico must approach per se invalidity without reference to the underlying benefit involved.

As previously discussed, the alleged purposes of the New Mexico statute are not legitimate or are not rationally related to the classification produced by the challenged residency requirement in N.M. Stat. Ann. § 7-37-5C(3)(d) (1978). Supra, at 33-42. A fortiori,

there can be no compelling state interest in or need for that residency requirement. Any additional purpose brought forth at this stage to justify a compelling state interest can be nothing more than an afterthought not entitled to any weight. Any legitimate purpose of New Mexico can be achieved by means far less violative of individual rights than the use of this oppressive residency requirement.

In the absence of a compelling state interest, this residency requirement cannot withstand the strict scrutiny mandated because of the burden it places on the right to travel. Thus, this requirement is invalid.

C. THIS COURT HAS NEVER APPROVED A RESIDENCY REQUIREMENT AS ONEROUS AS THIS REQUIREMENT.

As previously discussed, the

requirement of a bona fide residency appears permissible in most contexts, including the distribution of state benefits and the exercise of basic rights such as voting. Martinez v. Bynum, 461 U.S. 321, 103 S. Ct. 1838 (1983); Dunn v. Blumstein, 405 U.S. 330 (1972). However, in the absence of some compelling or vital state interest, this Court has struck down residency requirements more stringent than those required to insure that a bona fide residence does in fact exist. In Dunn v. Blumstein, this Court invalidated a Tennessee law requiring a one-year residency to vote.

In the context of distribution of state benefits, this Court has also invalidated durational residency rquirements of one year as unnecessarily long to assure a bona fide residence and

as having an impermissible impact on the right to migrate. In Shapiro v. Thompson, 394 U.S. 618 (1969), this Court struck down a one-year residency requirement for public assistance benefits. In Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), a one-year residency requirement for public, non-emergency medical assistance was invalidated. Finally, in Zobel v. Williams, 457 U.S. 55 (1982), this Court invalidated a residency requirement which was different from a typical durational residency requirement but which was more stringent than required to verify a bona fide residency.

In certain situations involving significant state interests or where the facts relating to a claim of residency may be ambiguous or difficult to ascertain, states have been allowed to

impose an additional period of time in which to test the bona fides of a claim of residence. Even in these cases, the additional test period for residency has been limited to one year. Starnes v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) (three-judge court), aff'd, 401 U.S. 985 (1971) (let stand a one-year residency requirement as a test of bona fide residence in connection with state university tuition). See also Vlandis v. Kline, 412 U.S. 441, 452-53 (1973) (invalidated an irrebuttable presumption regarding nonresidency but spoke favorably of a reasonable durational residency by which to determine the bona fides of a residency claim for university tuition purposes). In Sosna v. Iowa, 419 U.S. 393 (1975), a one-year durational residency requirement for access to divorce courts was upheld

because of the significant state interests such as preventing collateral attacks in other states on divorce decrees handed down by the Iowa courts. This Court appeared to consider the one-year residency requirement as an assurance or guarantee of the bona fides of the claim of residence rather than a separate residency requirement as is involved in this case. Id. at 408-409.

Only in rare cases has this Court approved a residency requirement which clearly goes beyond any requirements needed for establishing the bona fides of a claim for citizenship or residence. In Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973) (three-judge court), aff'd, 414 U.S. 802 (1973), this Court let stand a seven-year citizenship requirement to run for governor. A state unquestionably has a vital or

compelling interest in the qualifications of its highest public official. Accord Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974) (three-judge court), aff'd, 420 U.S. 958 (1975) (seven-year residency requirement to run for state senate upheld).

Appellants have found no decision in which this Court has approved a residency requirement of perpetual duration such as the one challenged herein. A state interest important enough to justify the imposition of such an onerous requirement does not readily come to mind.

III. THIS RESIDENCY REQUIREMENT IS ANALOGOUS TO AN IRREBUTTABLE PRESUMPTION OF NONRESIDENCY AND VIOLATES DUE PROCESS RIGHTS.

In Vlandis v. Kline, 412 U.S. 441 (1973), this Court struck down, as

violative of Fourteenth Amendment due process rights, a Connecticut statute which created a permanent and irrebuttable presumption that an unmarried student who was a nonresident for any part of the one-year period prior to the time of application for admission to a state university remained a nonresident throughout his or her enrollment. There was a similar irrebuttable presumption for married students based on such student's address at the time of application for admission.

This challenged residency requirement of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) produces a similar result. Upon arrival in New Mexico, a Vietnam-era veteran is "assigned" a status by that statute insofar as eligibility for a tax exemption is concerned. That status is

permanent and irrebuttable. The veteran is either granted the benefit on a continuing basis or forever denied the benefit based on that initial status. Nothing can be done to change that status. It matters little to affected veterans that the requirement is not officially labeled as a permanent and irrebuttable presumption. The effect is what counts.

One of the alleged purposes of the veterans tax exemption statute is "to reward New Mexico veterans...." (J.S. App. B 12). However, New Mexico's permanent and irrebuttable presumption of non-veteran status, as defined in subparagraph C(3)(d) of the statute, for all veterans who migrate to New Mexico after May 7, 1976, insures that the State purpose is not met. That presumption instead insures that some

bona fide New Mexico veterans, such as appellant, are not rewarded and never will be regardless of how long they remain citizens of New Mexico. Vlandis, 412 U.S. at 449.

The division between due process analysis and equal protection analysis is not sharp. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In many cases, equal protection analysis may be "no more than substantive due process by another name." Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring in the judgment). See McCoy, Recent Equal Protection Decisions--Fundamental Right to Travel or "Newcomers" as a Suspect Class?, 28 Vand. L. Rev. 987, 992-93 (1975). For example, in Carrington v. Rash, 380 U.S. 89 (1965), this Court invalidated, as violative of the Equal Protection Clause

of the United States Constitution, a provision of the Texas Constitution which created an irrebuttable presumption that a serviceman who moved to Texas during his military service remained a nonresident for purposes of voting so long as he remained a member of the armed forces. The rationale in Carrington seems quite analogous to that used in Vlandis v. Kline, 412 U.S. 441 (1973), which was decided on due process grounds. Both equal protection and due process place limits on arbitrary, irrational and discriminatory legislation. Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075, 1080 (M.D. Fla. 1978).

Under either analysis, the arbitrary and discriminatory residency requirement here in issue would fail.

IV. THE INVOLVEMENT OF A TAX BENEFIT DOES NOT GIVE NEW MEXICO THE POWER TO IGNORE FUNDAMENTAL RIGHTS.

The New Mexico Court of Appeals seemed to believe that because this statute involves a tax benefit, the State has substantial freedom to disregard the rights of its citizens in formulating classifications. (J.S. App. B 10, 19). That is not so. Although this Court has spoken of increased legislative freedom in taxation and economic legislation, such freedom is not without limits. In Regan v. Taxation With Representation of Washington, 461 U.S. 540, 103 S. Ct. 1997 (1983), this Court upheld a section of the Internal Revenue Code which denied a tax exemption status to certain nonprofit organizations engaged in lobbying activities even though another section of the Code granted that status

to veterans organizations engaged in similar activities. This Court stated that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." Regan, 461 U.S. at ___, 103 S. Ct. at 2002. However, this Court also clearly cautioned that "[s]tatutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right...." Regan, 461 U.S. at ___, 103 S. Ct. at 2002. Thus, a state certainly does not have a blank check regarding classifications in tax statutes.

Regan did not involve a residency requirement which burdened the right to travel; nor did it involve any other classification scheme which impacted a fundamental right. Thus, only a rational basis was required for the tax

classification therein. Since the New Mexico statute does impact the fundamental right to travel, it must withstand a "higher level of scrutiny."

An examination of other cases upholding a legislative freedom in economic or tax matters reveals that none also involved a classification of people based solely upon a residency requirement which implicates fundamental individual rights. See New Orleans v. Dukes, 427 U.S. 297 (1976) (regulation of pushcart food vendors); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (classifications of individual-owned and corporate-owned personal property); Madden v. Kentucky, 309 U.S. 83 (1940) (classifications of bank deposits). Classifying organizations, or property, or sources of income for economic or tax purposes is vastly

different than classifying admittedly bona fide citizens solely on the basis of their date of residency. The latter situation implicates the fundamental rights of the affected citizens and the State can show absolutely no authority for ignoring those rights in economic or tax legislation or any other situation. To allow such a cavalier disregard of constitutional rights would invite states to categorize offending statutes as tax or economic statutes.

The distribution scheme examined in Zobel v. Williams, 457 U.S. 55 (1982), appears to be in the nature of economic regulation. Yet this Court did not hesitate to invalidate that scheme because of its impact on fundamental rights. Also, this Court raised doubts on any alleged legislative freedom to use residency requirements for

classification purposes in tax legislation when it questions whether states could "impose different taxes based on length of residence[?]." Zobel, 457 U.S. at 64.

In the case of Williams v. Zobel, 619 P.2d 422 (Alaska 1980), a companion case in the Alaska courts to Zobel v. Williams, 457 U.S. 55 (1982), the Supreme Court of Alaska affirmed the invalidity of a statute which conditioned exemptions for state income taxes on dates or duration of residency. The Alaska Supreme Court clearly held that constitutional rights must still be respected even though the legislation deals with taxes. As noted in Zobel v. Williams, 457 U.S. at 58 n. 2, the Alaska Supreme Court held that varying tax exemptions on the basis of different residencies could "be

perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska." Labeling a statute as a tax measure gives the State no right to ignore that fundamental right.

In Lambert v. Wentworth, 423 A.2d 527 (Me. 1980), and Osterndorf v. Turner, 426 So. 2d 539 (Fla. 1982), the highest courts in Maine and Florida similarly invalidated tax exemption provisions based on durational residency requirements. Thus, it is clear that other courts do not accord the legislature the power to disregard the constitutional rights of individuals in the name of tax legislation. Neither should the courts of New Mexico allow the legislature to do so.

Assuming arguendo that no fundamental individual right is impacted by

a classification set forth in an economic or tax statute, the classification must still be rationally related to a legitimate state interest. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). It has already been demonstrated that the residency requirement in this New Mexico statute has no rational relation to any legitimate state purpose. Supra, at 33-42. Thus, this statute is invalid even under the minimum rationality test for tax or economic legislation.

V. THE INVALID RESIDENCY REQUIREMENT CAN AND SHOULD BE EXCISED FROM THE REMAINDER OF THE STATUTE BY THIS COURT.

Paragraph A of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) requires a bona fide residency which is not in issue here. In view of the decision of the Court of Appeals of New

Mexico that the additional fixed-date residency requirement of paragraph C(3)(d) challenged herein is also valid, no decision was rendered on the severability of that requirement from the remainder of the statute.

In the event this Court agrees that this additional residency requirement is invalid, the Court should go further and rule that the offending requirement be severed from the remainder of the statute, thereby leaving the remainder operative. Such action is within the power of this Court and its exercise would foster judicial economy and would protect appellants from further protracted and expensive enforcement of their legitimate rights.

Whether the residency requirement of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978), if found invalid, can be severed from

the remainder of the statute, leaving that remainder operative, should be determined by New Mexico law. Stevens v. Campbell, 332 F. Supp. 102, 107 (D. Mass. 1971) (three-judge court). However, regardless of whether New Mexico or federal law is applied, the answer is the same. The invalid residency requirement clearly may be severed from the remainder of the statute.

In New Mexico, the three-pronged test for severability of an invalid portion of a statute is set forth in State v. Spearman, 84 N.M. 366, 368, 503 P.2d 649, 651 (Ct. App. 1972), as follows:

> First, the invalid portion must be able to be separated from the other portions without impairing their effect. Second, the legislative purpose expressed in the valid portion

> of the act must be able to be given effect without the invalid portion. And, thirdly, it cannot be said, on a consideration of the whole act, that the legislature would not have passed the valid part if it had known that the objectional part was invalid.

These tests are met in this case and thus excision is appropriate.

This Court has spoken in similar terms on severabiity of invalid parts of a statute. In Champlin Rfg. Co. v. Commission, 286 U.S. 210, 234 (1932), this Court stated:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

See INS v. Chadha, 462 U.S. 919, ___, 103 S. Ct. 2764, 2774 (1983); Buckley v.

Valeo, 424 U.S. 1, 108-109 (1976).

The history of this challenged, fixed-date residency requirement shows that it was added only recently, long after the statute granting an exemption to Vietnam-era veterans was originally enacted. Appendix A. The statute without this challenged requirement fully implements the constitutional provision for the exemption. N.M. Const. art. VIII, §5. This residency requirement is clearly not an essential element of the statute. Thus, under either state or federal precedent, paragraph C(3)(d) may be severed from the remainder of N.M. Stat. Ann. § 7-37-5 and the remainder of that statute left operative.

CONCLUSION

The residency requirement here in issue, which permanently relegates appellants and all similarly-situated veterans who migrated to New Mexico after May 7, 1976 to the status of second-class or less worthy citizens, is incompatible with the constitutional guarantees of equality of citizenship, due process and freedom of interstate migration.

Accordingly, appellants respectfully request this Court:

(1) To reverse the decision and order of the Court of Appeals of New Mexico;

(2) To find N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) unconstitutional and to order the severance of this part from the remainder of the

statute;

(3) To order that appellants retroactively be granted a veteran's exemption in the amount of $2,000;

(4) To order repayment, with interest, of excess taxes paid by appellants on account of the denial of their claim for a veteran's exemption;

(5) For an award of costs of this appeal and reasonable attorneys' fees; and

(6) Such other relief as this Court shall consider just and appropriate.

Respectfully submitted,

HAROLD L. FOLLEY
Counsel for Appellants
1743 Soplo, SE
Albuquerque, NM 87123
(505) 844-3269

APPENDIX A

HISTORY OF PROVISIONS OF N.M. STAT. ANN. § 7-37-5 RELATING TO VIETNAM-ERA VETERANS

The tax exemption relating to Vietnam-era veterans was first enacted in 1973, effective January 1, 1975, as part of a statute covering all veterans. This statute required the veteran to have been a New Mexico resident prior to entering service from New Mexico and to have received a campaign medal for services in Vietnam during the period from August 5, 1964 to the official end of the conflict. It did not require residency in New Mexico at the time of claiming the exemption. 1973 N.M. Laws, ch. 258, §38 (codified as N.M. Stat. Ann. § 72-30-5 (1953) (recompiled as N.M. Stat. Ann. § 7-37-5 (1978)). Section 156 of this same law repealed the prior veterans exemption

statute, N.M. Stat. Ann. § 72-1-11 to -20.1 (1953) (as amended), which only covered veterans of earlier wars.

In 1975, the statute was amended (i) to more explicitly require entry into service from New Mexico and (ii) to delete the requirement for service in Vietnam and instead to require service during the period August 5, 1964 through January 1, 1974. This act (approved February 27, 1975) took effect immediately. 1975 N.M. Laws, ch. 3, §1. A subsequent amendment to paragraph A of the statute required residence in New Mexico at the time of claiming the exemption for 1976 and subsequent tax years. 1975 N.M. Laws, ch. 77, §1.

Amendments in 1977 clarified paragraph A to specifically include community or joint property but did not affect the provisions pertinent here.

1977 N.M. Laws, ch. 140, §1 and ch. 168, §1.

In 1981, the statute was amended, effective for tax years beginning on or after January 1, 1982, (i) to delete the requirements of residency in New Mexico prior to entering the service and entry into such service from New Mexico and (ii) to require the veteran to have been a resident of New Mexico prior to May 8, 1975 and to have served during the Vietnam conflict. 1981 N.M. Laws, ch. 187, §1. In 1983, after appellants had filed for the exemption, the statute was again amended to substitute "1976" for "1975." 1983 N.M. Laws, ch. 330, §1. Both dates are equally discriminatory with respect to appellants. The 1983 law was captioned as an amendment "to enlarge the period during which a Vietnam veteran may qualify for an

exemption from property tax."

The pertinent statutory language corresponding to the above history is set forth below.

I. Pertinent provisions of N.M. Stat. Ann. § 72-30-5 (1953) as originally enacted in 1973. 1973 N.M. Laws, ch. 258, §38.

> A. Two thousand dollars ($2,000) of the taxable value of property subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse, whether or not the veteran or surviving spouse is a New Mexico resident. The exemption shall be deducted from taxable value of property to determine net taxable value of property.
>
> . . . .
>
> C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were

engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) entering the armed services from New Mexico and was awarded a Vietnam campaign medal for services in Vietnam during the period from August 5, 1964, to the official termination date of the Vietnam conflict.

. . . .

II. Pertinent provisions of N.M. Stat. Ann. § 72-30-5 (1953) as amended in 1975. 1975 N.M. Laws, ch. 3, §1.

(Paragraph A was not amended.)

. . . .

C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) entering the armed services, entered the armed services from New Mexico and served on active duty at any time during the period from August 5, 1964 through January 1, 1974.

. . . .

III. Pertinent provisions of N.M. Stat. Ann. § 72-30-5 (1953) as further amended in 1975. 1975 N.M. Laws, ch. 77, §1.

> A. Two thousand dollars ($2,000) of the taxable value of property subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse, if the veteran or surviving spouse is a New Mexico resident....
>
> . . . .
>
> (Paragraph C was not amended.)
>
> . . . .

IV. Pertinent provisions of N.M. Stat. Ann. § 7-37-5 (1978) as recompiled from N.M. Stat. Ann. § 72-30-5 (1953) (as Amended).

> A. Two thousand dollars ($2,000) of the taxable value of property, including the community or joint property of husband and wife, subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse, if the veteran or surviving spouse is a New Mexico resident. The exemption shall be deducted from taxable value of property to determine net taxable value of property.
>
> . . . .

...(3) was a New Mexico resident prior to: ...(d) entering the armed services, entered the armed services from New Mexico and served on active duty at any time during the period from August 5, 1964 through January 1, 1974.

V. Pertinent provisions of N.M. Stat. Ann. § 7-37-5 (1978) as amended in 1981. 1981 N.M. Laws, ch. 187, §1.

(Paragraph A was not amended.)

. . . .

C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) May 8, 1975, if the period of armed conflict during which the person served was the Vietnam conflict.

. . . .

VI. Pertinent provisions of N.M. Stat. Ann. § 7-37-5 (1978) as amended in 1983. 1983 N.M. Laws, ch. 330, §1.

(Paragraph A was not amended.)

. . . .

C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) May 8, 1976, if the period of armed conflict during which the person served was the Vietnam conflict.

. . . .

No. 84-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

On Appeal from the Court of Appeals of the State of New Mexico

---

BRIEF FOR APPELLEE

H. BARTOW FARR III *
STEPHEN I. GLOVER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037

KENNETH HUNT
FAIRFIELD, FARROW, HUNT,
REECER & STROTZ
P.O. Box 26387
Albuquerque, NM 87125

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a New Mexico statute, granting a tax preference to veterans who resided in the State at the time of entering or leaving wartime service, is unconstitutional because it does not extend the same preference to veterans who resided elsewhere at the time established for determining eligibility.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-231

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

On Appeal from the Court of Appeals of the State of New Mexico

---

BRIEF FOR APPELLEE

STATEMENT

Appellants, Alvin D. Hooper and his wife, have challenged the denial to them of a tax exemption provided to certain Vietnam veterans by Section 7-37-5C(3)(d) of the New Mexico Statutes. N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (Repl. Pamp. 1983). The New Mexico Court of Appeals held that the statute did not infringe either appellants' right to travel or their rights to equal protection and due process under the Fourteenth Amendment. J.S. App. B1-B22. The Supreme Court of New Mexico denied a petition for certiorari. J.S. App. A1-A2.

The facts are straightforward. Section 7-37-5C(3)(d) provides that certain property owners in New Mexico may claim an exemption of Two Thousand Dollars ($2,000.00) from their total property valuation for tax

purposes if they meet several specified conditions. First, they must have served in the United States military during the Vietnam War for a period of at least 90 continuous days. Second, they must be a current resident of New Mexico. Third, and the condition at issue on this appeal, they must have been a resident of New Mexico prior to May 8, 1976. That date is one year from the date on which American troops in Vietnam were withdrawn. J.A. App. B15-B16.

New Mexico provides the same benefit for veterans of other wars upon similar conditions. In every situation, the applicant must have served for 90 continuous days "during a period of armed conflict" and must be a current resident of New Mexico. In addition, World War I veterans must have been residents of New Mexico prior to January 1, 1934; World War II veterans must have been residents prior to January 1, 1947; and Korean War veterans must have been residents prior to February 1, 1955. N.M. Stat. Ann. § 7-37-5 (1978).

Although the conditions for Vietnam veterans now correspond to the conditions for veterans of other wars, it was not always so. The initial statute extending an exemption to Vietnam veterans required that the veteran have been a New Mexico resident prior to "entering the armed services from New Mexico" and also that the veteran have been "awarded a Vietnam campaign medal for services in Vietnam" during a prescribed period. 1973 N.M. Laws, Ch. 258, at 1052. The statute was then amended in 1975 to eliminate the requirement of a medal but retained the condition that the veteran have entered the armed services from New Mexico. 1975 N.M. Laws, Ch. 3, at 11.

The statute was amended again in 1981, dropping the requirement that the veteran have entered the armed services from New Mexico. The new statute extended the tax exemption to any Vietnam veteran who "was a New Mexico resident prior to * * * May 8, 1975," regardless

of his residence when he entered the service. 1981 N.M. Laws, Ch. 187, at 1078. The statute was amended a third time in 1983, providing the exemption to any Vietnam veteran "who was a New Mexico resident prior to * * * May 8, 1976." 1983 N.M. Laws, Ch. 330, at 2112.

Appellant Hooper concededly does not meet the requirements of the statute. Although he is a current resident of New Mexico and served for 90 continuous days during the Vietnam war, he did not come to New Mexico before the eligibility date of May 8, 1976. Appellants, in fact, did not move to New Mexico until more than five years after the date specified for eligibility. J.S. App. B3.

Appellants nonetheless sought to claim the exemption, arguing that the eligibility date was unconstitutional. Appellee, the Bernalillo County Assessor, denied the claim because appellants did not satisfy the statutory conditions. A protest to the Bernalillo County Valuation Protests Board was subsequently rejected on the same grounds. J.S. App. B2.

The New Mexico Court of Appeals affirmed the denials. Disagreeing with appellants' contention that the statute burdened their right to travel, the court noted that the statute did not affect "such fundamental interests as voting, welfare benefits, or public medical assistance." J.S. App. B7. The court observed: "Denying such rights to new citizens even temporarily would penalize new residents and deter migration because those persons who contemplate moving interstate have reasonable expectations that such necessary, essential rights will be available. A veteran's property tax exemption is not such a right." J.S. App. B8.

The court also held that the statute did not violate appellants' right to equal protection. Looking at whether the statute "reflects legitimate state purposes" and "bears a reasonable relationship to those purposes," the court found that "[a] state's interest in expressing gratitude

and rewarding its own citizens for honorable military service is a rational basis for veterans' preferences." J.S. App. B15. The court went on to conclude that, while "[t]he legislature is entitled to reward and encourage veterans to settle in New Mexico, * * * it is also entitled to limit the period of time within which they may choose to establish residency." J.S. App. B16-B17.

The court of appeals distinguished the New Mexico statute from the more expansive statute challenged in *Zobel v. Williams*, 457 U.S. 55 (1982), noting that "[t]he statute at issue here extends a tax benefit not to *all* bona fide residents, but to a small class of New Mexico veteran residents." J.S. App. B18-B19 (emphasis in original). As a result, the court said, "[t]his classification scheme does not favor long-term residents as a class over those who have recently exercised their right to travel." J.S. App. B19. Instead, "[t]he legislature here extended a benefit to a specific class of New Mexico veteran residents in a manner that is rationally related to legitimate state interests." J.S. App. B19.

SUMMARY OF ARGUMENT

The New Mexico statute at issue in this case. N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (Repl. Pamp. 1983), provides a legitimate veterans benefit to veterans present in the State during a critical period. It does not violate appellants' right to travel or right to equal protection.

1. The State of New Mexico provides to a limited number of New Mexico residents a benefit denied to most New Mexico residents, regardless of the length of their residency. The State, in seeking to reward this particular class of veterans, had no intent to deter new residents (or new veterans) from entering New Mexico. See *Shapiro v. Thompson*, 394 U.S. 618 (1969). Nor does the denial of the benefit—a modest tax exemption—act as a barrier to, or substantial penalty on, a significant class of persons wishing to travel. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The proper test to be applied, therefore, is the rational basis test. See pages 7-13 *infra*.

2. The New Mexico statute rationally rewards veterans who spent the difficult years immediately before or after their Vietnam service in New Mexico. The State may recognize the special contributions made, and the problems faced, by veterans in time of war, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), and it may extend appropriate benefits to veterans who were in New Mexico at the most difficult times. *August v. Bronstein*, 369 F. Supp. 190 (S.D.N.Y.), *summarily aff'd*, 417 U.S. 907 (1974). The statute here does not assign appellants to a "second-class citizenship," see *Zobel v. Williams*, 457 U.S. 55 (1982), but simply recognizes that they were not present in New Mexico when the specific conditions justifying the exemption existed. See pages 13-24 *infra*.

3. If the Court nonetheless finds the statute unconstitutional, it should remand the severability issue to the New Mexico state courts. Alternatively, it should hold that the provision challenged here is not severable. See pages 24-26 *infra*.

ARGUMENT

The familiar rule, in reviewing state legislation challenged on equal protection grounds, is that legislation will be struck down only if "it is without any reasonable basis, and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). While virtually any legislation affects certain persons differently from others, the proper inquiry is not whether the classifications are inexact but whether they cause "different treatments * * * so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). When the classification concerns "a noncontractual bene-

fit under a social welfare program," a State violates the equal protection clause "only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

This Court has made clear that such deferential review is not to be evaded by caviling over rationality. "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Rather, the courts must "defer[] to legislative determinations as to the desirability of particular statutory discriminations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Confronted by these resiliant principles, appellants here take two unsurprising courses. First, they say that the classification is not rational, arguing that distinctions among veterans based upon date of residency in New Mexico are simply arbitrary. Second, they contend that, in any event, the courts must apply a test of strict scrutiny because the statute penalizes the right to travel. Neither argument withstands analysis.

Taking appellants' points in reverse order, we think it evident that the New Mexico statute does not seek to, and does not, burden the right to travel in any meaningful sense. Rather, New Mexico provides, as many other states have done, a modest bonus (here, a tax exemption) to veterans leaving the State for wartime service or relocating there immediately thereafter. In so doing, the State has chosen a cutoff date for determining eligibility, a date that is rationally related to the purpose of aiding particular veterans leaving or returning to the State at times of conflict and not just veterans generally. This Court should not prohibit the State from making that legitimate choice.

1. The New Mexico Statute Does Not Burden the Right to Travel.

Although appellants treat the issue as a secondary one, we think that the initial question before the Court is the standard of review to be applied to this tax statute. Appellants contend that the statute, even if supported by a rational basis, must fall because it burdens the right to travel.[1] We disagree.

Although the right to travel is by now well-recognized, little about it is free from controversy. To begin with, of course, its origins remain a matter of continuing dispute. See *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982); *id.* at 66-67 (Brennan, J., concurring); *id.* at 71-74 (O'Connor, J., concurring). Over time this Court or various of its members have attributed the right to the Commerce Clause (*e.g.*, *Edwards v. California*, 314 U.S. 160 (1941)); the Privileges and Immunities Clause of Article IV (*e.g.*, *Zobel v. Williams*, *supra*, 457 U.S. at 73-74 (O'Connor, J., concurring)); the Privileges and Immunities Clause of the Fourteenth Amendment (*e.g.*, *Edwards v. California*, *supra*, 314 U.S. at 177, 181 (Jackson and Douglas, JJ., concurring)); and the Due Process Clause of the Fifth Amendment (*e.g.*, *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958)). Despite this range of opinions, the Court, in the end, has found "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

---

[1] This Court has held that, in cases where a substantial burden is placed upon the right to travel, the State must justify the burden with a compelling State interest. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969). More recently, the Court has noted that "right to travel analysis refers to little more than a particular application of equal protection analysis." *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) (holding that Alaska statute failed the rational basis test). Because we believe that New Mexico has not burdened the right to travel, we will assume *arguendo* that a higher standard would be required if it had.

The dimensions of the right are, likewise, the subject of some uncertainty. Carried to its logical extreme, the right to travel could be held to invalidate fees or tolls imposed on interstate movement (see, *e.g.*, *Shapiro v. Thompson*, *supra*, 394 U.S. at 648-49 (Warren, C.J., dissenting)) or to prevent any State from conducting activities that a potential resident thought undesirable.[2] But this Court has never extended the right to such lengths. While the Court has struck down deliberate attempts to fence out new residents (*e.g.*, *Edwards v. California*, *supra*) and has prohibited the denial of important rights and benefits based on recent travel (*e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)), it has never held that new residents have an unqualified right to any state benefit enjoyed by prior residents. See, *e.g.*, *Sosna v. Iowa*, 419 U.S. 393 (1975); *Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily aff'g* 326 F. Supp. 234 (D. Minn. 1970) (three-judge court); *Sturgis v. Washington*, 414 U.S. 1057, *summarily aff'g* 368 F. Supp. 38 (W.D. Wash. 1973) (three-judge court); *Sununu v. Stark*, 420 U.S. 958 (1975), *summarily aff'g* 383 F. Supp. 1287 (D.N.H. 1974) (three-judge court).[3]

Whatever the precise contours of the right to travel may be, however, we are confident that the statute in this case does not burden it. If the current right to travel is to bear any relation to its theoretical underpinnings, and not merely serve as a pretext to override concededly ra-

---

[2] This Court has observed that "[e]ven a bona fide residence requirement would burden the right to travel, if travel meant merely movement." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974). But this Court has held that residency requirements do not violate equal protection. See *Martinez v. Bynum*, 461 U.S. 321 (1983), and pages 18-19 *infra*.

[3] This Court has also held that a State may restrict a resident's right to travel because of his own misconduct. See *Jones v. Helms*, 452 U.S. 412, 417-23 (1981).

tional state legislation, it should be invoked to invalidate legislation only when that legislation seeks to, or actually does, significantly burden "the right to travel from one state to another * * *." *United States v. Guest*, 383 U.S. 745, 757 (1966). In making that determination, the courts must look to, among other things, the purpose of the legislation, the rights or benefits at stake, and the persons divided into the favored and disfavored classes. See, *e.g.*, *Shapiro v. Thompson*, *supra*; *Dunn v. Blumstein*, *supra*; *Memorial Hospital v. Maricopa County*, *supra*. The ultimate question is simply whether the States, in a practical sense, have "penalize[d] those persons * * * who have exercised their constitutional right of interstate migration * * *." *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (separate opinion of Brennan, White, and Marshall, JJ).

At the outset, therefore, we note that appellants do not, and reasonably could not, allege that the New Mexico statute was passed for the *purpose* of deterring migration to New Mexico. To the contrary, the very existence of the statute evidences that New Mexico has a high regard for veterans who have served in time of war, since it extends to many of them a benefit not enjoyed at all by nonveterans. The statute thus stands in stark contrast to the statute in *Edwards v. California*, *supra*, by which California had sought expressly to deter an influx of indigents into the State. See 314 U.S. at 171. Noting that unmistakable purpose, the Court in *Edwards* disapproved "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Id.* at 173. Similarly, in *Shapiro v. Thompson*, *supra*, the Court struck down a durational residency requirement for the receipt of welfare benefits, noting "weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions." *Id.* at 628. The Court

stated flatly: "[T]he purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible." *Id.* at 631. See *Cole v. Housing Authority of Newport*, 435 F.2d 807, 812 (1st Cir. 1970) (purpose of "inhibiting migration by needy persons into the State").

Although the absence of an impermissible purpose does not end the inquiry, it nonetheless merits considerable weight. While a State may burden the right to travel without expressly setting out to do so, see *Dunn v. Blumstein, supra*, 405 U.S. at 339-41, it is purposeful exclusion that poses the most serious threat to "the principle of free interstate migration, and * * * its role in the development of the Nation." *Zobel v. Williams, supra*, 457 U.S. at 67 (Brennan, J., concurring). In cases where barriers are deliberately created, the State is setting out to do what it absolutely may not do; in other cases, however, the State is likely to be pursuing wholly legitimate goals through classifications that are challenged, as many state classifications are challenged, as being impermissibly broad or narrow. In such circumstances, like those in this case, the line between right-to-travel analysis and garden-variety equal protection analysis is likely to be far less distinct.

Where no improper purpose exists, therefore, litigants relying on the right to travel should, at a minimum, be able to point to some serious *effects* on the right arising from the statute. No such effects can be shown, or even imagined, in this case. Although appellants halfheartedly claim that the tax exemption at issue "is clearly significant to most citizens," Appellants' Brief at 67, it would stretch credulity past the breaking point to say that decisions about residence in New Mexico could actually turn on the availability of this particular exemption. Indeed, as we discuss below (pages 12-13 *infra*), the exemption is not one that is available to most current citizens of

New Mexico or to most prospective residents of New Mexico, because they are not veterans. Most decisions about residence in New Mexico must necessarily be made without regard to eligibility for the exemption.

This situation is thus, once again, very different from the conditions in other cases reviewed by this Court. Potential New Mexico residents are not being told that they must do without welfare benefits (*Shapiro v. Thompson, supra*), the right to vote (*Dunn v. Blumstein, supra*), or important medical benefits (*Memorial Hospital v. Maricopa County, supra*) while their allegiance to the State is being tested. Denial of "a basic necessity of life," whether done to deter travel or not, will plainly act either to inhibit migration or exact a serious penalty from those choosing to migrate anyway. See *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 258-261. But neither the deterrence nor the "penalty" is of the same dimension when the benefit is one of the hundreds of preferences and exclusions built into the taxing structure of any State.[4] It is entirely logical, therefore, that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 259; see J.S. App. B7-B8.[5]

---

[4] On an elemental level, any distinction among residents based on the time or duration of residence could be said to "penalize" travel. But this Court has said on several occasions that some "waiting period[s] * * * may not be penalties." *Shapiro v. Thompson, supra*, 394 U.S. at 638 n. 21; *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 258-59. A reviewing court thus must consider "the extent to which the residence requirement served to penalize the exercise of the right to travel." *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 257 (emphasis omitted).

[5] In *Strong v. Collatos*, 593 F.2d 420 (1st Cir. 1974), relied on by appellants (Appellants Br. at 35-36), the court of appeals noted that the benefits at issue—defined to include "food, shelter and necessities to a needy family"—were the claimants' "only source of

Apparently recognizing that no real effect on travel is involved in this case, appellants turn to the position that an infringement on the right to travel need not involve any infringement on travel itself. Appellants Brief at 61 ("no actual deterrence to travel or migration is required"). While we agree that this Court has not required plaintiffs claiming a right to travel to show that they themselves were deterred or to introduce evidence that some other class of potential travelers was deterred, see *Dunn v. Blumstein, supra*, 405 U.S. at 340-41, it would trivialize the right to travel to say that no burden at all on travel must be present. The strict scrutiny required by the right to travel should be applied only when some class of potential travelers could reasonably regard the loss of a particular benefit (such as welfare payments or medical care) as substantial enough to raise more than a *de minimis* barrier to travel. As this Court has demonstrated, where no such possible burden exists, traditional equal protection analysis is fully adequate for review of classifications among residents of a particular state. *Zobel v. Williams, supra.*

We also think it relevant that the classification involved here, unlike those in *Shapiro*, *Dunn*, and *Memorial Hospital*, is not one favoring all, or even most, current residents of the State. The tax exemption is, instead, a benefit intended just for veterans, in particular those veterans for whom New Mexico assumed a special responsibility through and immediately after the Vietnam war. See pages 16-22 *infra*. Many persons who have lived in New Mexico all their lives do not qualify for the exemption; others with far shorter periods of residence in the State do qualify. The deciding characteristic is not the extent of allegiance to the State but dependence on the State

---

subsistence aid." *Id.* at 422. The court thus concluded that the benefits were indistinguishable from the welfare benefits in *Shapiro v. Thompson, supra*, and could not be conditioned on a three-year residency requirement.

during a period when veterans had a special claim for recognition.

This point is significant for several reasons. First, as we have remarked, it undercuts the notion that the exemption is an important influence on the decision whether to live in New Mexico or any suggestion that it is seen as creating two general classes of citizenship. Furthermore, it defuses the possible concern that older residents are discriminating politically against yet-to-be residents without a political voice. The statute, in fact, grants a benefit to a small class of existing New Mexico residents and simultaneously denies it to a much larger number of existing New Mexico residents. When the majority of old residents elect to treat themselves in the same fashion as the excluded newer residents, there is little likelihood that the benefits denied to them will be "basic necessities of life" or other substantial advantages.

The New Mexico statute, in short, does not try to deter new residents, cannot realistically be thought to deter new residents, and excludes many older residents from a benefit given to many newer ones. As such, it poses no meaningful barrier to the right to travel or the structure of our Nation. If it rests upon a rational basis, it should be upheld.

2. The Tax Exemption Rests Upon a Rational Basis.

Before turning to the statute at issue, we note that the deference to state judgments implicit in the rational basis test is even more pronounced with regard to taxing enactments. As this Court has observed, "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). "When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the Na-

tional Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959).

These principles are squarely grounded in principles of federalism. This Court has often recognized that "the entire Country is made up of a Union of separate State governments * * * and that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Few decisions can be closer to the core of state sovereignty than the decisions regarding how to allocate tax burdens among various groups. Those decisions inevitably depend upon political choices that are almost uniquely suited for legislative, rather than judicial, assessment. Indeed, this Court, in limiting federal-court challenges to state taxing policies, has specifically emphasized "the important and sensitive nature of State tax systems." *Fair Assessment in Real Estate Ass'n v. McNary*, 455 U.S. 100, 102 (1981).

While appellants apparently do not dispute these principles, they nonetheless claim that the New Mexico statute is arbitrary because it creates a "second-class citizenship" for veterans coming to New Mexico after May 7, 1976. Appellants' Brief at 28. According to appellants, the decision of this Court in *Zobel v. Williams*, *supra*, prohibits the State from distinguishing between veterans leaving or returning to New Mexico during wartime and veterans who spent those unusually difficult years elsewhere. See generally Appellants' Br. at 25-53. This view, however, both distorts the effect of the New Mexico statutory scheme and misperceives the proper extent of the relationship between a State and its own citizens.

a. *New Mexico May Choose to Assist Returning Veterans.*

It is necessary, in assessing whether a statute rests upon a rational basis, to examine with some care just what the statute does. The statute in the present case, N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (Repl. Pamp. 1983), embodies a basic policy followed by New Mexico for more than half a century: to give financial assistance to veterans who lived in New Mexico prior to a time of war or returned to New Mexico shortly thereafter. The policy was first set forth in 1933 for World War I veterans with an eligibility date of January 1, 1934. Similar assistance was provided to World War II veterans settling in New Mexico prior to January 1, 1947, and to Korean War veterans arriving before February 1, 1955. Although the New Mexico legislature first granted assistance to Vietnam veterans only if they "enter[ed] the armed services from New Mexico and [were] awarded a Vietnam campaign medal for services in Vietnam" during a designated period, it later modified the statute to conform the policy to that followed for other wars. See pages 2-3 *supra*.

There is nothing irrational, indeed nothing unusual, about a statute that rewards returning veterans. Despite appellants' implicit suggestion that the State is off on a frolic of its own, New Mexico is but one of at least 26 States that now have, or have had, a policy of giving bonuses or other assistance to returning veterans. *See, e.g.*, Staff of House Comm. on Veterans' Affairs, 98th Cong., 2d Sess., State Veterans' Laws 309-311 (Comm. Print 1984). Most statutes provide the assistance in the form of cash bonuses, graduated in amount according to length of service. Two states, however, New Mexico and Wyoming, provide a continuing tax exemption in lieu of a direct bonus. See Wyo. Stat. § 39-1-202.

While the eligibility requirements for such assistance vary from state to state, it is noteworthy that the re-

quirements imposed by New Mexico are the least restrictive of all. For several States, the basic requirement is that the veteran have been a bona fide resident at the time of his entry into the service. *See, e.g.*, 51 Pa. Cons. Stat. Ann. §§ 20122-20123. Many States establish a stiffer test, however, imposing a condition of residence for six months or, in some cases, a year prior to entry. *See, e.g.*, Ky. Rev. Stat. § 40.005 (6 months); Ill. Rev. Stat. Ch. 126½, § 57.52 (1 year). A few States expressly provide that no bonus shall be paid to veterans receiving a bonus from another State or that the amount of other bonuses shall be deducted. *See, e.g.*, Ill. Rev. Stat. Ch. 126½, § 57.52. New Mexico, in contrast, grants its assistance to any veteran who was a resident at the time of entering service, any veteran who was a resident prior to the time of entering service whether he entered the service from New Mexico or not, and any veteran who returned to the State from the war before a certain date, even if the veteran in question had been eligible for and received a bonus from another State.[6]

These benefits are based on the traditional, and entirely reasonable, notion that veterans deserve special thanks and special help. Indeed, courts have generally required little in the way of justification for veterans' benefits, evidently believing, as one court said, that "it is apparent to anyone who has lived through periods of war that contrived explanations are not necessary." *August v. Bronstein*, 369 F. Supp. 190, 193 (S.D.N.Y.), *summarily aff'd*, 417 U.S. 901 (1974). This Court has recently noted that "[o]ur country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan v. Taxation*

[6] This case thus does not involve a requirement of residency at a particular point in time *and* a durational residency requirement. See *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980) (striking down 10-year durational residency requirement but upholding requirement of residence at time of entry into the service).

With Representation of Washington, 461 U.S. 540, 551 (1983). The Court stated flatly: "This policy has 'always been deemed to be legitimate.'" *Id.*, quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 n.25 (1979). See also *Johnson v. Robison*, 415 U.S. 361 (1974).

It is true, of course, that New Mexico does not give its tax benefit to all veterans, but rather to those veterans who had established ties to the State before May 8, 1976. But that distinction rests on two eminently rational assumptions: first, that veterans on the point of picking up or laying down the burdens of war have a different claim to benefits than veterans further removed from such unsettling times; and, second, that New Mexico has a special responsibility to those veterans who picked up and laid down the burdens while residents of the State.

With regard to the first of these assumptions, even a cursory sense of history would suggest the particular strains felt by servicemen as they leave, or just after they return to, civilian life. This Court has pointed out that "[v]eterans have been obliged to drop their own affairs and take up the burdens of the nation * * *, subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Regan v. Taxation With Representation of Washington, supra*, 461 U.S. at 550-51 (internal quotes and citations omitted). See also *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980). As Judge Friendly has noted, the various preferences for veterans are grounded in a "[d]esire to compensate in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces and to express gratitude for such service * * *." *Russell v. Hodges*, 470 F.2d 212, 218 (2d Cir. 1970). It stands to reason that the effects of that disruption are likely to be at their most severe at the point of entry into the service and at the

point of return.[7] And, for the most part, it is veterans in that class to whom the New Mexico benefit is granted.

The eligibility date in this case thus works very differently from a durational residency requirement. In the latter case, the inquiry turns upon the *length of time* that one has been a citizen of the State; here, by contrast, the inquiry turns upon the *point in time* when one was a citizen. See *Langston v. Levitt*, 425 F. Supp. 642, 646 n.6 (S.D.N.Y. 1977). The group of veterans entering and leaving the service before May 8, 1976, faced problems while in New Mexico that later arrivals simply did not. By the time this latter class of veterans had migrated to New Mexico, they had already had the opportunity to readjust to civilian life in other States, including the opportunity to receive whatever benefits those States provided to returning veterans immediately following the war.[8]

Turning to the second assumption underlying the statute, we see no constitutional defect in the recognition that New Mexico has a different relationship with the departing or returning veterans within its borders than with veterans who turned to other States. The very nature of state sovereignty means that States, in many instances, may treat their own citizens differently from citizens of other States.[9] As this Court's decisions upholding bona

[7] To ease the transition, and to avoid additional sacrifice arising from military service, many States provide that returning veterans must be restored to their previous jobs and that various deadlines applicable to other state citizens are to be extended. *See generally* State Veterans Laws, *supra*, 1-306.

[8] Indeed, it is likely that some veterans coming to New Mexico after the cutoff date had received bonuses from other States to help them with the adjustment to civilian life following the war.

[9] Different considerations apply when a State denies nonresidents a basic right of national citizenship rather than a benefit created and funded by the State. See *United Buildings and Construction Trades Council of Camden County v. Mayor and Council of the*

fide residency requirements make clear, a State need not disburse its benefits generally throughout the Nation but may provide them exclusively to its own citizens. See, *e.g.*, *Martinez v. Bynum*, 461 U.S. 321 (1983); *Plyler v. Doe*, 457 U.S. 202 (1982). No one would seriously question that a State can provide its own citizens with free public services or welfare benefits, simply because they are citizens, without becoming obliged to provide them to citizens of other States as well. As this Court has stated, "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Martinez v. Bynum*, *supra*, 461 U.S. at 328.

These principles cannot be realistically applied, however, without an awareness that both the pool of citizens within a State and the conditions attacked by state programs change over time. If they are to respond to changing circumstances, therefore, States must be able to extend benefits to residents at one time that they do not extend to residents at other times. For example, a State may sensibly decide to grant low-interest loans to its residents in a year of tight money and not grant them to its residents in later years when the need for state support is different. While that policy would mean in practical terms that residents not present in the earlier years would not be receiving benefits still enjoyed by some older residents, it would seem well within the limits of the equal protection clause. The alternative would be to put States to the Hobson's choice of either extending programs indefinitely or retroactively depriving residents of benefits previously granted them. See *City of New Orleans v. Dukes*, *supra*, 427 U.S. at 303-06 (upholding a grandfather clause al-

City of Camden, 104 S.Ct. 1020 (1984); *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948).

lowing certain established vendors to operate while abolishing newer ones).

We thus have little doubt that New Mexico could have declared a benefit on May 7, 1976, for all its then-resident veterans, whether in the form of a one-time cash bonus, or a bonus payable in installments, or a tax exemption over a period of years, without being obligated to pay the same benefit to any veteran who showed up five years later. See, *e.g.*, *Langston v. Levitt*, *supra*, 425 F. Supp. at 646 ("Numerous federal courts have recognized that a state's interest in expressing gratitude and rewarding its own citizens for their honorable military service is a rational basis for veterans' preferences * * *").[10] The fact that the benefit was awarded retroactively to the same class of veterans does not make it any less valid. The question in each case is simply whether New Mexico could rationally believe that resident veterans in 1976 had a claim distinguishable from veterans arriving later.[11] Appellant Hooper would have had no legitimate complaint if the State had paid a bonus to all veterans returning to New Mexico before May 8, 1976, even though Hooper (having gone elsewhere) would not have gotten one. Nor would he have been entitled, as a matter of equal protection, to demand one by showing up five years past the deadline. He simply was not in New Mexico when the

[10] The court in *Langston* cited the following cases: *Rios v. Dillman*, *supra*; *Russell v. Hodges*, *supra*; *White v. Gates*, 253 F.2d 868, *cert. denied*, 356 U.S. 973 (1958); *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) (three-judge court); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgan v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *summarily aff'd*, 410 U.S. 976 (1973).

[11] This view is especially appropriate here because the State, in amending the statute in 1981 and afterwards, did nothing more than apply to Vietnam veterans the same general standards already applied to veterans of other wars. It would be perverse to prevent the State from correcting an inequity on the ground that the time of entering and leaving the service had passed.

conditions justifying the exemption were deemed to exist. See *Lambert v. Wentworth*, *supra*, 423 A. 2d at 534 (tax exemption for veterans entering service from Maine "must be viewed as expressing the State's gratitude to that class of veterans most worthy of its bounty because of their citizenship status *at the time they interrupted their economic lifestyle in answering the call to patriotic duty*") (emphasis added).[12]

The statute in this case thus does not present the same problems as the statute in *Zobel v. Williams*, *supra*. In apportioning cash distributions solely on the basis of length of residency in the State, Alaska made no effort to respond to the particular conditions faced by residents at a particular time. Rather, it offered only the generalized explanation that the statute "reward[ed] past contributions," apparently tax contributions in leaner years.[13] As this Court observed, however, that rationale "could open the door to state apportionment of other rights, benefits and services according to length of residence." *Id.* at 64. The effect was thus to create a true second-class citizenship.

The New Mexico statute, by contrast, recognizes the circumstances faced by its own citizens as veterans, particularly as they uprooted their normal lives to enter the service. As we previously have noted, this Court itself has

[12] For the same reasons, there is no merit to appellants' argument that New Mexico has wrongfully applied an irrebuttable presumption against them. Appellants' Br. at 73-77. New Mexico has simply tried to help a particular class of veterans, a class to which appellant Hooper indisputably does not belong. Appellants' argument is that New Mexico cannot choose to help that particular class alone, not that Hooper should have a chance to prove his right to be included in it.

[13] It is readily apparent that the duration of residence bears no real relationship to the amount of taxes paid. Thus, even without regard to the purpose of the legislation, it is doubtful that the use of residency as a surrogate for contributions could have been sustained. See 457 U.S. at 63 n.10.

acknowledged the problems that service often entails. *Regan v. Taxation With Representation of Washington, supra*, 461 U.S. at 550-51. Moreover, it has summarily affirmed *state* recognition of such circumstances, even though the State limited its compensation to its own veterans. *August v. Bronstein, supra.* In *August*, a case involving an employment preference for veterans, the district court had upheld a requirement of residency when entering the service, observing: "The preference is a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the State thereafter." *Id.* at 193. The court found that the grant of a "modest veterans' preference" was "substantially related to the purpose of the State." *Id.*

Finally, we note that the benefit conferred is by no means disproportionate to the State purpose. It is a modest financial preference, not an exclusive claim on essential state services. In short, New Mexico has given reasonable help to veterans who, as its citizens, were dependent on it during a time of upheaval in their lives. That gesture is comfortably within the tolerable limits of the equal protection clause.

b. *The Use of An Eligibility Date is Not Impermissible.*

The means chosen by New Mexico to accomplish its purpose were also permissible. Contrary to appellants' contention, the equal protection clause does not prohibit the use of a fixed date to determine eligibility.

To begin with, the date itself is not unrelated to the purposes of the statute. Although appellants argue that the date selected is "purely arbitrary," Appellants' Brief at 52, the date is directly related to the end of hostilities in Vietnam. As the New Mexico Court of Appeals noted, the date of May 8, 1975, one year before the current eligibility date in the statute, is the date "of the final U.S. troop withdrawal" from Vietnam. J.S. App. B15-B16. Its use

as a benchmark for the difficulties of returning to civilian life is by no means far-fetched.

Appellants' real grievance thus appears to be not with the use of this particular date, but with use of a date for eligibility at all. The initial problem with this approach is that it knows no limits. It is, of course, common practice for Congress and state legislatures to set eligibility dates for various programs.[14] Indeed, given the fact that programs and conditions inevitably change, it is difficult to see how some programs could exist without the use of eligibility dates.

The second problem with appellants' complaint is that it demands a precision in creating classifications that this Court has found to be unnecessary. It is, of course, apparent that residency before May 8, 1976, does not bear an exact correlation with the general purpose of aiding returning veterans.[15] But no such exactitude is required. This Court has made clear that "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes, supra*, 427 U.S. at 393.

---

[14] For example, the statute in this case also requires that veterans claiming the exemption have served during specified periods of time and for at least 90 days. If appellants were correct in their attack on eligibility dates, veterans serving in peacetime or for less than 90 days could also insist on receiving the exemption.

[15] It is, for example, possible that someone who was born in New Mexico, left New Mexico well before the war, and then returned after May 8, 1976, would get the benefit denied to appellants, even though he did not establish any dependency on New Mexico at or around the time of the war. But, so long as a statute generally serves its intended purpose, its constitutionality need not depend on the occasional occurrence of an unlikely sequence of events. See, e.g., *Phelps v. Board of Education*, 300 U.S. 319, 324 (1937) (individual inequities do not violate equal protection clause).

In any event, quite apart from the issue of dates themselves, appellants' argument would effectively eliminate the rational basis test. If rationality were always to be judged by the degree of difference between persons on one side of a legislative line and those immediately on the other side, very few statutes would survive even minimum scrutiny. It is obvious, for example, that persons having one dollar more than the maximum allowed for receiving certain benefits have a claim that is virtually indistinguishable from persons having one dollar less. The essence of legislative line-drawing is to make those difficult choices.[16]

Appellants' position, at bottom, is not much different from that of any person disadvantaged by state legislation. Thousands of New Mexico citizens do not qualify for some state benefit or another because they fall on the wrong side of a legislative line. Appellants' problem is not that New Mexico drew an irrational line but that they do not benefit by it. The equal protection clause does not provide a remedy for that problem.

3. The Issue of Severability, If Any, Is a Matter For the New Mexico Courts.

Appellants argue that if this Court rules that the fixed-date residency requirement is unconstitutional, it should also rule that the requirement be excised from the statute, leaving the rest of the statute fully operative. In effect, appellants would have this Court rewrite N.M. Stat. Ann. § 7-37-5C(3) to make the property tax exemption available to any veteran who is a resident of New Mexico and who served during the Vietnam conflict. In our view, the New Mexico courts should resolve the question whether the fixed-date residency requirement is severable from the rest of the statute. Even if this Court

[16] Appellant is not himself just on the other side of the line. It is undisputed that he did not come to New Mexico until August 1981. J.S. App. B3.

may properly resolve the severability issue, however, we think it clear that the fixed-date residency requirement is not severable.

The question of severability is, quite obviously, a matter of State law.[17] In addressing the issue, the basic inquiry is whether the unconstitutional provision can be separated from the other provisions of the statute without impairing its effect, and whether the New Mexico legislature would have enacted the rest of the statute if it had known that it could not enact the unconstitutional provision.[18] The New Mexico courts are clearly in the best position to resolve these issues regarding the proper interpretation and revision of New Mexico law.

This Court reached a similar conclusion in *Zobel v. Williams, supra.* After ruling that retrospective application of Alaska's dividend distribution program was unconstitutional, it remanded to the Alaska courts the question whether the remainder of the program should be left operative. The Court did note that the Alaska legislature had left no doubt about the issue, since it had included a section expressly declaring any unconstitutional provision

[17] It is well-settled that state courts are the final arbiters of all questions regarding the proper interpretation of state law, and that federal court interpretations are not binding on the state courts. See, *e.g., Mullaney v. Wilbur*, 421 U.S. 684, 689 (1975); *Murdock v. Memphis*, 20 Wall. 590 (1875). Thus, even if this Court were to decide the severability issue, the New Mexico courts would still be free to reinterpret the statute.

[18] As a technical matter, New Mexico rules of statutory construction should be applied to determine whether a clause contained in a New Mexico statute is severable. Under New Mexico law, the unconstitutional portion of the statute will be regarded as severable if: (1) it can be separated from the other portions of the statute without impairing their effect; (2) the legislative purpose expressed in the valid portions of the act may be given effect without the invalid portion; and (3) the legislature would have passed the valid portions of the statute even if it had known that the objectionable part was invalid. *State v. Spearman*, 84 N.M. 366, 368, 503 P.2d 649 (N.M. Ct. App. 1972).

to be nonseverable. Despite this clear indication, however, this Court stated: "[I]t is of course for the Alaska courts to pass on the severability clause of the statute." 457 U.S. at 65.

Even if the Court should decide to resolve the severability question itself, it should not revise the statute to provide that every Vietnam veteran residing in New Mexico is entitled to the property tax exemption, regardless of the date of his arrival in the State. The New Mexico legislature passed this statute to assist New Mexico residents who left the State for service in the Vietnam war or who settled in New Mexico shortly after the war was over. The statute is thus consistent with the New Mexico statutes assisting veterans of other wars, none of which extends the benefits to veterans generally. The revision of the statute proposed by appellants would therefore expand the scope of the statute in a manner rejected by the legislature in over fifty years of enactments in this area. Rather than supplanting the New Mexico legislature and creating its own version of an acceptable veteran preference program, the Court should rule that the fixed-date residency requirement is not severable and that the entire statute must be struck down.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

H. BARTOW FARR III *
STEPHEN I. GLOVER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037

KENNETH HUNT
FAIRFIELD, FARROW, HUNT,
REECER & STROTZ
P.O. Box 26387
Albuquerque, NM 87125

* Counsel of Record

No. 84-231 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALVIN D. HOOPER and MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

On Appeal from the Court of Appeals of the State of New Mexico

---

BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF THE BERNALILLO COUNTY ASSESSOR

PAUL BARDACKE
Attorney General
BRIDGET A. JACOBER
(Counsel of Record)
Special Assistant Attorney General
Taxation and Revenue Department
Post Office Box 630
Santa Fe, New Mexico 87509-0630
(505) 988-2290

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-231

ALVIN D. HOOPER and MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

On Appeal from the Court of Appeals of the State of New Mexico

---

BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF THE BERNALILLO COUNTY ASSESSOR

INTEREST OF AMICUS CURIAE

The State of New Mexico (state), on behalf of the Taxation and Revenue Department (department) joins in this appeal as amicus curiae to support the position of appellee, the Bernalillo County Assessor (assessor). The interest of the state in this case derives from the department's responsibility to uphold the New Mexico Property Tax Code (Code). Sections 7-35-1 and 7-35-3 NMSA 1978.

The state joins in this case, as it participated as amicus curiae in the New Mexico Court of Appeals, in support of the statutory definition of veteran found in § 7-37-5(C) NMSA 1978. *Hooper v. Bernalillo County Assessor*, 101 N.M. 172, 679 P.2d 840 (Ct.App. 1984), *cert. denied*, 101 N.M. 77, 678 P.2d 705 (1984). The state asserts that this statute is a constitutional method of rewarding New Mexico war veterans and that the challenged portion of the definition of veteran cannot be severed from the exemption as a whole.

SUMMARY OF ARGUMENT

The definition of veteran in the veteran property tax exemption, § 7-37-5(C) NMSA 1978, does not substantially interfere with the right to travel and therefore is constitutional because there is a rational basis for the different treatment accorded to the persons affected by the statute. New Mexico's veteran property tax exemption is a reasonable method for rewarding New Mexico residents who served this country during times of armed conflict.

If this Court finds that the exemption does not meet equal protection standards, the case should be remanded to the state court to determine if the offending portion of the statute is severable. In the alternative, if this Court reaches the severability issue, the entire statutory exemption must be invalidated. State law precludes broadening the application of the tax exemption, which would be the effect of severing the definition from the statute as a whole.

POINT I

THE STATUTORY DEFINITION OF VETERAN MEETS EQUAL PROTECTION STANDARDS BECAUSE REWARDING A STATE'S OWN VETERANS IS A RATIONAL PURPOSE.

Appellant property owner argues that the statutory definition of veteran violates the equal protection provision of the federal constitution. This definition limits

the grant of the exemption to those veterans who were residents prior to induction, who became residents after induction but before active tour of duty or who became residents within an established period following the cessation of conflict. While the statute does create two classes of persons accorded different treatment, this classification is reasonable and therefore is not a denial of equal protection. *Independent Warehouses v. Scheele*, 331 U.S. 70 (1947).

A. The validity of the definition of veteran is to be determined under the rational basis standard.

Determination of the constitutionality of the veteran tax exemption requires a two step analysis: first, what standard is to be applied to determine if equal protection has been denied and, second, whether that standard has been transgressed. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

As this Court has held, a statute imposing a residency requirement will be examined under the strict scrutiny test only if it impairs a person's ability to function and thus substantially interferes with the right to travel; otherwise it will be judged by the rational basis standard. *Shapiro v. Thompson*, 394 U.S. 618 (1969). All residency requirements may interfere to some degree with migration. *Dunn v. Blumstein*, 405 U.S. at 342, n. 13 (1972). But not every statute which has an adverse impact on a person who has exercised the right to travel is subject to strict scrutiny.

> The amount of impact required to give rise to the compelling-state-interest test was not made clear [in *Shapiro v. Thompson*]. The Court spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration . . . . Second, the Court considered the extent to which the residence requirement served to *penalize* the exercise of the right to travel.

Memorial Hospital v. Maricopa County, 415 U.S. 250, 256-57 (1974) (emphasis in original).

A finding that the fundamental right to travel had been violated invoked the strict scrutiny standard in *Shapiro, Dunn* and *Memorial Hospital* because of the severity of the penalty intrinsic to the operation of the residency requirement. In each of those cases the application of the residency requirement resulted in a denial of benefits which were essential to a resident's ability to function as a citizen—welfare benefits, the right to vote and medical assistance for an indigent. This combination of a residency requirement and the denial of a benefit of vital importance triggered the finding that the fundamental right to travel was infringed; the residency requirement alone did not constitute the prohibited infringement.

In contrast, the rational basis test applies when the residency requirement affects a benefit that does not substantially impair a new resident's ability to function as a citizen. *See Memorial Hospital v. Maricopa County, supra.* This Court has endorsed the application of the rational basis standard to residency requirements which may inconvenience but do not deprive a citizen of a significant state benefit. *Starns v. Malkerson,* 401 U.S. 985 (1971), *affirming* 326 F.Supp. 234 (D.Minn. 1970).

Whatever effect on the right to travel the New Mexico veteran exemption may have, it does not rise to the level of a penalty. Comparing *Shapiro, Dunn,* and *Memorial Hospital* to the facts of this case, it is clear that the property owner is not deprived of a life sustaining or other vital benefit by having established New Mexico residence after May 8, 1976. An exemption from taxation of a maximum of $2,000 of property is more closely analogous to the benefit of in-state tuition, *Starns v. Malkerson, supra,* than to welfare benefits, medical assistance or voting rights. The grant or denial of the property tax exemption has little financial impact on a veteran moving to

New Mexico.[1] To qualify for the exemption a veteran must own real property. Persons with the financial capability to purchase real property are not likely to be substantially penalized by the denial of this property tax exemption.

Finally, the challenged statute is a tax exemption—a legislative gratuity in which no rights vest. *Murphy v. Taxation and Revenue Department,* 94 N.M. 90, 607 P.2d 628 (Ct.App. 1979). As such it could be reversed or withdrawn at any time. Therefore, in deciding whether to travel or not to travel, any reliance on the grant of the exemption would be misplaced. Because the fundamental right to travel is not substantially infringed by the residency requirement in § 7-37-5(C) NMSA 1978, the standard by which to judge the statute is whether a rational basis exists for the creation of two classes.

B. Section 7-37-5 NMSA 1978 has a rational basis.

New Mexico's veteran tax exemption meets the rational basis standard because the statute serves a legitimate governmental goal. The intent of § 7-37-5(C) is to reward persons who served in periods of armed conflict as residents of New Mexico or who established residency in New Mexico shortly thereafter.

The contributions which New Mexico recognizes through its veteran tax exemption are actual, tangible contributions of wartime military service. Though this Court has not yet ruled on the point, goals similar to New Mexico's have been found to have a rational relation to veteran preference statutes by various other courts. *Langston v. Levitt,* 425 F.Supp. 642 (S.D.N.Y. 1977). As explained in the lower court's opinion in *August v. Bronstein,* 369 F.Supp. 190 (S.D.N.Y.), *aff'd,* 417 U.S. 901 (1974):

[1] Translated into cash value the veteran exemption is worth a maximum of $106 per year to a property owner when the tax rate of .053 is multiplied by the exemption amount of $2,000.

> The preference is a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the state thereafter. . . .
>
> Clearly, the modest veterans' preference at issue here is substantially related to the purposes of the state.

369 F.Supp. at 193. *Accord Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980); *Miller v. Board of County Commissioners of Natrona County*, 337 P.2d 262 (Wyo. 1959).

Appellant contends that *Zobel v. Williams*, 457 U.S. 55 (1982), controls this case. The reason for rewarding New Mexico resident veterans is not the same as the purpose of the Alaskan benefit which was found invalid in *Zobel*. New Mexico rewards its veterans for actual, positive contributions to the military effort; service during periods of conflict and an honorable discharge are necessary to qualify for the exemption. These services differ drastically from the undefined, intangible and perhaps nonexistent contributions made by Alaska's citizens through their mere presence in the state.

Like the statutes at issue in the above cited cases, the veteran tax exemption is basically restricted to persons who were residents of New Mexico while serving in the military. The statute includes an additional period to allow individuals to claim the exemption when residency is established within a short period following the conflict for which the veteran's status is claimed. As explained in detail in appellee Bernalillo County Assessor's Reply Brief, the statute has a rational basis. Amicus adopts and will not repeat that argument.

In summary, the residency requirement of the veteran tax exemption does not have an impact on the right to travel by impairing a citizen's access to life-sustaining or other necessities. Because the infringement is not critical, the statute is to be judged by the rational basis standard. The veteran's tax exemption meets this test by devising a reasonable method of rewarding New Mexico's veterans.

POINT II

THE DEFINITION OF VETERAN CANNOT BE SEVERED FROM THE STATUTE BECAUSE IT IS INTEGRAL TO THE GRANT OF THE EXEMPTION.

The appellant has requested this Court to rule that the portion of the statute which requires a veteran to establish residency by a given date can be severed from the statute so that the exemption continues with a broadened scope. The state asserts that this result is not supported by law.

If this Court finds that the residency requirement of the veteran property tax exemption is unconstitutional, this case should be remanded to the New Mexico Court of Appeals to determine whether the residency requirement can be severed from the statute as a whole. *Zobel v. Williams*, 457 U.S. 55 (1982). The issue of the severability of the statute hinges on state created rights, and therefore is a state law question. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1933).

If the Court decides to resolve the severability issue itself it should rule against severability. Under applicable New Mexico legal precedent, because the definition of veteran which contains the residency requirement is integral to the exemption, it cannot be separated from the statute. New Mexico law provides a three-pronged test for determining if an act is severable. That test is:

> First, the invalid portion must be able to be separated from the other portions without impairing their effect. Second, the legislative purpose expressed in the valid portion of the act must be able to be given effect without the invalid portion. And, thirdly, it cannot be said, on a consideration of the whole act,

that the legislature would not have passed the valid part if it had known that the objectionable part was invalid.

State v. Spearman, 84 N.M. 366, 368, 503 P.2d 649 (Ct.App. 1972). The veteran property tax exemption does not survive this test—severance would undermine the operation and be inconsistent with the legislative purpose of the statute.

The requirement that residency be established by the dates designated in the statute cannot be separated from the exemption as a whole because such severance would judicially expand the grant of the exemption to a broader class of persons. The purpose of an exemption is to grant a benefit to a special group of persons; essential to the operation of an exemption are the parameters of the class of recipients. *See McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). Because the grant of the exemption is integrally connected to the factors which determine those eligible for it, the definition of the class cannot be separated from the exemption as a whole without substantially changing the effect of the statute.

This conclusion is supported by *Safeway Stores v. Vigil*, 40 N.M. 190, 57 P.2d 287 (1936), where the portion of a tax statute which defined the class of taxpayers was found unconstitutional. The New Mexico Supreme Court in *Safeway Stores* found that the statutory definition of retail dealer was arbitrary in that it resulted in taxing only merchants who sold goods in small parcels and exempted those whose merchandise was not so contained. The operation of the tax statute was determined to be dependent on the meaning of retail dealer. Therefore the whole act was found invalid when the court found that the definition violated equal protection standards.

In this case, the challenged portion of § 7-37-5(C) NMSA 1978 has the effect of limiting the class of persons eligible for the veteran exemption. Therefore, the intent of the legislature, as determined from the language of the statute, is to confine the grant of the exemption to persons who were residents of New Mexico at a time closely associated with their military service during war. If this Court were to delete the contested language from the statute, the result would be that persons who the legislature specifically excluded from the grant of the exemption would receive such benefits. This would be contrary to the express legislative intent and would impair the budgets of county governments by creating a tax exemption substantially beyond the scope anticipated by the legislature.

Severability is also unwarranted because the full text of § 7-37-5 NMSA 1978 reveals no support for an assertion that the legislature would have enacted the veteran exemption without the challenged residency requirement. The text of the veteran exemption very clearly designates the dates by which a person claiming the exemption must have established residency in New Mexico. There is nothing in the statute which suggests that this requirement is dispensable. To the contrary, since 1933 the statutory amendments evidence inclusion of this or a similar residency requirement. *Flaska v. State*, 51 N.M. 13, 177 P.2d 174 (1946). Coupled with these facts is the consistent legal authority stating that legislative intent to create a tax exemption is never presumed but must be expressed in clear and unambiguous language. *McClanahan v. State Tax Commission of Arizona, supra.* No grounds exist to presume that the legislature would be willing to exempt from taxation the property of persons other than those specified in the statute.

In conclusion, if this Court finds a denial of equal protection, this case should be remanded to the state court to apply the appropriate remedy. Even if the Court does not remand the case, it should rule against severability. New Mexico laws would, under these circumstances, in-

validate the entire veteran exemption. Any other result would have the effect of a legislative act since a group of persons previously denied an exemption by the legislature would henceforth be entitled to one.

CONCLUSION

The state asserts that the definition of veteran found in § 7-37-5(C) is a rational method of rewarding persons who served this country on behalf of New Mexico. If this Court finds that the criteria for qualifying for the veteran tax exemption is unconstitutional, the case should be remanded to the state court or the exemption should be ordered invalid in its entirety.

Respectfully submitted,

PAUL BARDACKE
Attorney General
BRIDGET A. JACOBER
(Counsel of Record)
Special Assistant Attorney General
Taxation and Revenue Department
Post Office Box 630
Santa Fe, New Mexico 87509-0630
(505) 988-2290

No. 84-231

IN THE

Supreme Court of the United States

October Term, 1983

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOTION BY AMERICAN LEGION, AND VETERANS OF FOREIGN WARS (DEPARTMENTS OF NEW MEXICO), AND THE VIETNAM VETERANS OF NEW MEXICO, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF
and
BRIEF OF AMICUS CURIAE IN SUPPORT OF THE APPELLEE

DAVID GREER
122 Tenth Street, NW
Albuquerque, New Mexico 87102
(505) 842-5535
Counsel for Amicus Curiae

December, 1984

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

No. 84-231

IN THE

Supreme Court of the United States

October Term, 1983

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The American Legion, and Veterans of Foreign Wars, (Departments of New Mexico), and the Vietnam Veterans of New Mexico, Inc., hereby respectfully request leave to file the attached Brief Amicus Curiae in this case. The consent of the counsel for the appellee has been obtained. The consent of the appellant was requested but refused.

This case deals with the constitutionality of the New Mexico Veterans Tax Exemption (Section 7-37-5 NMSA 1978 as

amended) which is the primary method by which New Mexico expresses its appreciation to war veterans for their service. The appellant-Taxpayer's complaint herein is directed specifically against the portion of the exemption dealing with Vietnam Era veterans; however, the grounds for his appeal apply equally against the entire veterans' tax exemption.

The appellee, Bernalillo County Assessor, is one of a group of state officials responsible for collecting tax revenues. His responsibilities do not include protecting the rights of veterans.

Our three organizations are the major advocates for the Vietnam veteran, and for all veterans' rights in New Mexico. We request permission to explain our position in support of affirmance of the New Mexico Court of Appeals, by means of the Brief attached hereto.

Respectfully submitted,

DAVID GREER
122 Tenth Street, NW
Albuquerque, New Mexico 87102
(505) 842-5535
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 84-231

IN THE

Supreme Court of the United States

October Term, 1983

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF AMICUS CURIAE AMERICAN LEGION, AND VETERANS OF FOREIGN WARS (DEPARTMENTS OF NEW MEXICO), AND THE VIETNAM VETERANS OF NEW MEXICO, INC. IN SUPPORT OF THE APPELLEE

INTEREST OF AMICUS CURIAE

The American Legion and Veterans of Foreign Wars are chartered by Special Act of Congress, Pub. L. No. 66-47, 41 Stat. 284, to uphold and remain faithful to the Constitution of the United States. We are joined in this Brief Amicus Curiae by the non-profit corporation, Vietnam Veterans of New Mexico, the only veteran service organization directed primarily for Vietnam veterans in New Mexico. We are grateful for the opportunity to express our position here.

Our membership consists of honorably discharged or separated veterans, many of whom are entitled to receive the tax exemption involved in this appeal.

A finding that the exemption statute as presently constructed is unconstitutional will cause all the veterans of New Mexico to be harmed, both in the loss of individual benefits and in their emotional reaction to having a benefit which has been in existence for 60 years suddenly removed.

Our interest is to protect the rights of the New Mexico War Veterans and insure that they are treated fairly.

SUMMARY OF ARGUMENT

The New Mexico Veterans tax exemption contains legitimate residency requirements which have been in effect for over 60 years. These classifications were established by legislative action to define and apportion bonuses to veterans making New Mexico their home. New Mexico has never used a cash bonus to reward her veterans but instead furthers the legitimate goal of expressing its appreciation of its veterans through the exemption.

The appellant–Taxpayer (hereinafter referred to as "Taxpayer") is asking this Court to penalize New Mexico's veterans because the Veterans tax exemption is more inclusive in its definition of veterans than other states have been. In its bonus plan, New Mexico grants tax exemptions to its native sons and to other returning war veterans who choose to make New Mexico their home immediately following the cessation of hostilities during which they served.

The exemption is the only expression of appreciation many veterans have received for their service and sacrifice. Denying them the continued benefit of the exemption is not required under the Constitution and is contrary to the public policy

supporting veteran bonuses. The New Mexico Court of Appeals' decision should be affirmed.

ARGUMENT

I. THE RESIDENCY REQUIREMENTS OF § 7-37-5 N.M.S.A. 1978, AS AMENDED, DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Since 1921, New Mexico has recognized the need to reward veterans for the service they have given during periods of war. By special election the people of New Mexico adopted Art. VIII, § 5, of the Constitution of New Mexico providing for a Veteran Tax Exemption. In 1923, the legislature enacted the first statute creating the actual exemption. The exemption allowed a $2,000 reduction off the Taxpayer's property value. The amount of the exemption has remained the same to this date.

In 1946, the New Mexico Supreme Court interpreted the constitutional provisions involving the exemption statute and applied the benefits of the exemption to veterans of World War II. *Flask v. State*, 51 N.M. 13, 177 P.2d 174 (1946). Over the years the statute has been amended repeatedly, always maintaining the requirement that the eligible veteran has established his residency within the state immediately following the cessation of hostilities.

In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103, S.C., 1997 (1983), the Court stated:

> Legislatures have especially broad latitude in creating classifications in distinctions in tax statutes. (At 547)

Similarly, in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L. Ed. 2d 870 (1979), the Court stated:

> The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification . . .;
> When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern
> . . . .
> The calculus of effects, the manner in which a particular law reverberates in a Society, is a legislative and not a judicial responsibility. (At 272)

The *Feeney* case upheld as valid a Massachusetts statute granting a lifetime preference to veterans within the Civil Service System.

The New Mexico residency classification is not intended to harm the interest of the Taxpayer or any other Vietnam veterans, but rather is a system developed over the years to define the class of veterans which the legislature has deemed to be eligible for the exemption.

The Taxpayer's argument that the residency requirement interferes with his right to travel is mistaken. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256-57, 94 S.C. 1076, 39 L. Ed. 2d 306 (1974), the Court made it clear that the degree of impact upon the right to travel would determine whether or not a state would need to demonstrate by means of the compelling state interest test their justification for the statute. In the instant case, the exemption does not arise to the level of either deterring migration, or penalizing the exercise of the right to travel, and as such is constitutionally proper.

The residency requirement within the exemption statute is the method employed by the legislature to identify the class of persons which the legislature has decided to reward. It is in the national interest to grant to veterans preferences, bonuses, and rewards for their service to country. The judicial justification for such measures are usually thought to reward the

veteran for the sacrifice of military service, to encourage further patriotic service, and to ease the transition from military to civilian life. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 265, 99 S.Ct. 2282, 60 L. Ed. 2d 870 (1979).

New Mexico has never had a cash bonus plan for its veterans. From the period shortly following World War I to the present, New Mexico has rewarded its veterans by means of the instant tax exemption. The argument propounded by the taxpayer herein, sounds much like the position of the claimant in *Leech v. Veterans Bonus Division Appeals*, 426 A.2d 289, 179 Conn. 311 (1979). In that case, a Vietnam Era veteran was denied a cash bonus by the state of Connecticut because he did not meet their residency requirement. Connecticut required domicile within their state for one year immediately *prior* to the veteran's induction into military service. The Supreme Court of Connecticut held that a rational relationship existed between the domicile requirement and the legitimate state interest to reward veterans.

In *August v. Bronstein*, 369 F.Supp., 190 (S.D.N.Y. 1974), *aff'd*, 417 U.S. 901 (1974), New York state's veteran benefit law also required a one year domicile *prior* to induction, for eligibility. The New York residency requirement in that case was held to be constitutional after the application of the rational relationship test.

Considering the fact that classifications involving veterans' benefits which incorporate the requirement of domicile *prior* to induction have been held constitutionally valid, *Leech* and *August, supra*, one must question the Taxpayer's reasoning in attacking the New Mexico statute. New Mexico does not require prior domicile to establish eligibility for this benefit. New Mexico's veteran exemption statute defines a larger class of veterans. New Mexico historically is very supportive of our nation's warriors.

The statute does not violate any constitutional principle, and in fact serves to create a constituency of New Mexico veterans who feel secure in the vested benefit they have received. Although the amount of the exemption has not increased since it was first enacted, it does represent an emotional and psychological support for all veterans in our state. The fact that it does not grant unlimited benefits to all veterans who served during a period of armed conflict does not invalidate its positive purpose.

There is no valid distinction between the residence classification systems which were held valid in *August v. Bronstein,* 369 F.Supp. 190 (S.D.N.Y. 1974), *aff'd,* 417 U.S. 901 (1974), and *Leech v. Veterans Bonus Division Appeals,* 426 A.2d 289, 179 Conn. 311 (1979), and the New Mexico statute. New Mexico's sensitivity to the need for rewarding returning war veterans in as gracious a manner as is financially possible should not be penalized. The statute in question should be upheld.

II. THE NEW MEXICO SUPREME COURT IS THE PROPER FORUM TO DECIDE THE SEVERABILITY QUESTION.

The New Mexico Court of Appeals did not decide the severability of the residency requirement in § 7-37-5 C in their opinion denying the Taxpayer's relief. *Hooper v. Bernalillo County Assessor,* 101 N.M. 172, 679 P.2d 840 (N.M. App. 1984).

It is the opinion of the amicus curiae herein that the residency requirements were an essential part of the legislative purpose in enacting the exemption, and that it is improbable that the legislature would have enacted the exemption had there been no limitations whatsoever in respect to the residency requirements. While we would be joyful if the New Mexico legislature decided to extend veterans' exemptions to include

all New Mexico residents who served in the military during wartime, given the reality that state government expenditures must be conserved today, we recognize that the probability of such a result is minimal.

If this Court believes that the New Mexico veterans' tax exemption is constitutionally defective, then the issue of the severability of the residency requirement should be heard and decided by the New Mexico Supreme Court.

CONCLUSION

For the reasons stated above, amicus curiae herein respectfully requests this Court deny the appeal of the Taxpayer and allow New Mexico to continue to reward its veterans.

Respectfully submitted,

DAVID GREER
122 Tenth Street, NW
Albuquerque, New Mexico 87102
(505) 842-5535
Counsel for Amicus Curiae

December, 1984

(7)

CASE NUMBER 84-231

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

ALVIN D. HOOPER AND MARY N. HOOPER,
APPELLANTS

VS.

BERNALILLO COUNTY ASSESSOR,
APPELLEE

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REPLY BRIEF OF APPELLANTS

Alvin Dillard Hooper
Counsel of Record
1712 Pedregoso Pl., SE
Albuquerque, NM 87123
(505) 844-8900

Harold L. Folley
1743 Soplo, SE
Albuquerque, NM 87123

25P

TABLE OF CONTENTS

TABLE OF AUTHORITIES

This brief replies to the briefs of appellee Bernalillo County Assessor (hereinafter "Assessor"), amicus curiae State of New Mexico (hereinafter "State"), and amicus curiae American Legion, et al. (hereinafter "Legion"). Those three briefs are based on the erroneous premises and incorrect facts set forth below and consequently are of little value in clarifying the issues in this case.

I. THE MAY 8, 1976 DATE IS NOT RATIONALLY RELATED TO THE WITHDRAWAL OF AMERICAN TROOPS FROM VIETNAM OR ANY OTHER EVENT AND RESIDENCY ON THAT DATE, OR IMMEDIATELY PRIOR THERETO, IS NOT REQUIRED.

Appellee Assessor erroneously states that the challenged May 8, 1976 date "...is one year from the date on which American troops in Vietnam were withdrawn..." and thus is directly and rationally related to that event. Appellee's Br. 2, 22.

A cursory review of public records indicates that the Vietnam cease-fire agreement was signed in Paris on January 27, 1973, and the last American troops were withdrawn from Vietnam on March 29, 1973. Agreement on Ending the War and Restoring Peace in Viet-nam, Jan. 27, 1973, 24 U.S.T. 1, §5 at 6; T.I.A.S. No. 7542, §5 at 6. See also, N.Y. Times: Jan. 24, 1973 at 1; Jan. 28, 1973 at 1; and Mar. 30, 1973 at 1, col. 1-3 (copies attached as Appendix A).

In light of the correct facts, the connection of the May 8, 1976 date to the withdrawal of troops becomes much more tenuous than appellee asserts. In short, the May 8, 1976 date is arbitrary and has no direct or rational connection to troop withdrawal or anything else which can be a legitimate basis for discriminating among resident-veterans. In its decision below,

the Court of Appeals of New Mexico relied, at least in part, on this same incorrect fact now being asserted anew by appellee. J.S. App. B 15-16.

Appellee Assessor also asserts that this statute in essence simply provides an exemption to Vietnam-era veterans who were residents of New Mexico on May 7, 1976, and the retroactive declaration of this benefit in 1983 does not make it any less valid. Appellee's Br. 20-21. This assertion and accompanying reasoning is fallacious. Section C(3)(d) of N.M. Stat. Ann. 7-37-5 requires residency at any time "...prior to...May 8, 1976...", not <u>on</u> May 7, 1976. Further, the declaration in 1983 of a tax exemption for those veterans who had been residents on May 7, 1976 is clearly not the same as making that same declaration on May 7, 1976. In the latter case, the State would have been making no

distinctions between its then resident-veterans, i.e., if the declaration had been made on May 7, 1976, all resident-veterans at that time would have received the benefit. However, in the actual case herein of the declaration in 1983, the State was clearly discriminating among its then bona fide resident-veterans.

Appellee Assessor next argues that the May 8, 1976 date is valid because it corresponds with similar conditions imposed on veterans of other conflicts in order to receive the tax exemption. Appellee's Br. 2, 15, 20 n. 11. See also, Amicus State's Br. 9 and Amicus Legion's Br. 3. That argument of course assumes the validity of the residency requirements for other conflicts, a matter not free from doubt. Further, the argument is not factually correct. The residency requirement set forth in N.M. Stat. Ann.

7-37-5C(3) for each other conflict was added prior to or about the time of the designated date itself and/or the designated date corresponds with the date established by Congress for determination of eligibility for certain veterans' benefits.[1] The May 8, 1976 date challenged herein has neither of these features.

---

[1]The January 1, 1934 residency requirement for World War I veterans was enacted in 1933. 1933 N.M. Laws, ch. 44, §1. The January 1, 1947 date for World War II veterans was added in March 1947. 1947 N.M. Laws, ch. 79, §1. The January 1, 1947 date for World War II and the February 1, 1955 date for the Korean War both correspond with the dates established by Congress for determination of eligibility for certain veterans' benefits. 38 U.S.C. §101(8), (9) (1982).

II. THE CHALLENGED STATUTE DOES NOT REQUIRE A SPECIAL NEXUS BETWEEN THE VETERAN AND NEW MEXICO BASED ON RESIDENCY DURING MILITARY SERVICE.

Beginning on the very first page with appellee's Question Presented and continuing throughout the brief, appellee repeatedly asserts and relies upon the erroneous premise that this challenged statute provides a tax exemption for "...veterans who resided in the State at the time of entering or leaving wartime service..." and validly denies that benefit to other veterans such as appellant. Appellee's Br. at (i), passim. Amicus curiae State and amicus curiae Legion rely on this same erroneous premise but neither appellee nor amici point to any statutory language or other support for this premise.

Even a cursory reading of N.M. Stat. Ann. § 7-37-5 (1978) shows that it requires no special nexus or relationship

between the veteran and New Mexico based on residency during military service. Rather, that statute requires that the veteran must have served "...on active duty continuously for ninety days... during a period in which the armed forces were engaged in armed conflict..." and that the veteran must have been a "...New Mexico resident prior to... May 8, 1976...." Whether that period of prior residency overlaps with, is in close proximity to, or is remote from the period of military service is immaterial. Having once established residency at any age and at any time prior to May 8, 1976, a person could have left New Mexico and resided in another state for an extended period, entered service from that other state, returned to that other state after completing service and remained there indefinitely without being denied the tax

exemption once he or she finally returned to New Mexico. Appellants' Br. 29-30, 39-40. Regardless of what the statute previously provided, or even what the legislature intended for it to provide after its amendments in 1981 and 1983, the plain language of the statute in its present form does not require a special nexus based on a coincidence of military service and residency in New Mexico. See Appellants' Br. App. A. Accordingly, appellee's and amici's complete reliance on this erroneous special-nexus premise nullifies their arguments.

Whether a special nexus based on a coincidence of military service and residency is a valid basis by itself for discriminating between bona fide resident-veterans has apparently never been addressed in an opinion by this Court and need not be addressed in this case. In

any event, that special nexus is a substantial factor not present in this challenged New Mexico statute. Thus this Court need not address appellee's Question Presented.

In reliance on the erroneous special-nexus premise, appellee argues that the statute is designed to benefit "...veterans leaving or returning to the State at times of conflict..." and to address "...the particular strains felt by servicemen as they leave, or just after they return to, civilian life." Appellee's Br. 6, 17. Appellee continues that immediately after returning, veterans "...faced problems while in New Mexico that later arrivals simply did not. By the time this latter class of veterans had migrated to New Mexico, they had already had the opportunity to readjust to civilian life...." Appellee's Br. at 18.

See also, Amicus State's Br. at 5 and Amicus Legion's Br. at 2, 3. The history of this statute clearly refutes those arguments. The previous May 8, 1975 date was not added to the statute until 1981 and the present May 8, 1976 date was not added until 1983. Appellants' Br. App. A. Thus the tax exemption was not given to the veterans who migrated to New Mexico during the May 7, 1975-May 7, 1976 period until approximately eight years after their return to civilian life. It is ludicrous to suggest that this alleged interest in helping veterans readjust to civilian life supports the retroactive selection in 1983 of the May 8, 1976 cut-off date for residency. It also is pure speculation to assume in 1983 that the veterans who arrived after May 7, 1976 would have less need for, or be less deserving of, the tax exemption than the

veterans who arrived during the May 7, 1975-May 7, 1976 period.

Appellee Assessor and amicus State assert that so long as the statute "generally" or "for the most part" serves an intended purpose, it is valid. Appellee's Br. at 18, 23 n. 15; Amicus State's Br. at 6. Such reasoning discards any concept of individual rights under the Fourteenth Amendment and would virtually immunize all legislation from any challenge that it violates equal protection or due process rights of a state citizen. A statute must be tailored for its intended purpose. There is little doubt that the statutes invalidated in Zobel v. Williams, 457 U.S. 55 (1982); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969), and numerous other cases "generally" served the purpose of

providing welfare benefits, etc., to those who needed them. Nevertheless, those statutes were invalidated because they violated constitutional rights guaranteed to any person within the jurisdiction of the state.

III. THE CHALLENGED RESIDENCY REQUIREMENT BURDENS APPELLANTS' RIGHT TO TRAVEL AND SHOULD BE SUBJECTED TO STRICT SCRUTINY.

For the reasons set forth above and in their brief, pages 25-53, appellants believe the challenged residency requirement is analogous to that addressed in Zobel v. Williams, 457 U.S. 55 (1982), and like that requirement, it cannot pass even the minimum rational purpose test. However, if this Court does decide that this minimum test is passed, it should go further and subject this challenged residency requirement to strict scrutiny because of its burden on appellants' right

to travel as set forth in appellants' brief, pages 54-73.

Appellee and amici predictably argue that appellants' right to travel has not been burdened because they have not been denied a fundamental right or benefit. They read this Court's decisions as establishing an exclusive list of rights and benefits which must be denied before infringement of the right to travel can be invoked. See Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (non-emergency medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights); and Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits). Such rationale is nothing more than an attempt to water down the fundamental right to travel and make it synonymous with some denied benefit.

Appellee and amici also argue that a

benefit must be a substantial factor in deciding whether or not to migrate to a state before its denial would unconstitutionally burden the right to travel. Appellee's Br. 10-11, 13; Amicus State's Br. 3, 5; Amicus Legion's Br. 4. That is nothing more than another face of the contention that deterrence is required. That contention is not supportable. See Appellants' Br. 61-62.

The argument that the tax exemption could be withdrawn at any time and thus its denial does not impose a penalty is not worthy of consideration. Amicus State's Br. 5. The same argument appears equally applicable, and equally nonpersuasive, with respect to the welfare benefits in Shapiro, the medical care in Memorial Hospital, and the dividend in Zobel. The penalty on the right to travel arises from discriminatory distribution of

a benefit based solely upon the time of exercising that fundamental right, not on whether the benefit is provided at all. See Appellants' Br. 60-61.

The challenged residency requirement divides New Mexico's resident Vietnam-era veterans into two classes, indistinguishable from each other except that one is composed of veterans who resided in the State at some time before May 8, 1976, and the other is composed of veterans such as Hooper who did not have such prior residence. See Shapiro v. Thompson, 394 U.S. at 627. It is clear that the right to travel of the latter class has been burdened because they have been disadvantaged and relegated to second-class citizenship status as compared with the former class solely because of the date of exercise of that right. Zobel v. Williams, 457 U.S. at 60 n. 6. This

burden calls for strict scrutiny by this Court of the residency requirement creating the disadvantage. See Appellants' Br. 59-68. This residency requirement cannot withstand even minimal scrutiny. A fortiori, it cannot withstand strict scrutiny.

IV. THE REQUIREMENT OF RESIDENCY PRIOR TO MAY 8, 1976 CAN BE SEVERED FROM THE REMAINDER OF THE STATUTE BY THIS COURT.

Appellee Assessor incorrectly states the New Mexico law regarding severability. Compare appellee's brief, page 25, note 18, subparagraph (3) with the third test set forth in State v. Spearman, 84 N.M. 366, 368, 503 P.2d 649, 651 (Ct. App. 1972). Appellants' Br. 86-87. Appellee's incorrect statement of the law would in essence place the burden on appellants herein to show that the New Mexico legislature would have passed the statute

had it known of the invalidity of the objectionable part. Amici echo this incorrect statement. Amicus State's Br. 9; Amicus Legion's Br. 6. The New Mexico rule for severability as set forth in Spearman clearly places the burden on appellee herein to refute severability by showing that the legislature would not have passed the statute had it known of the invalidity of the May 8, 1976 date. Appellee has not, and cannot, meet that burden.

The fact that New Mexico law may govern the issue of severability of the invalid residency requirement does not mean that this Court should abstain from making that decision. The New Mexico law on severability is clear and needs no further interpretation by the New Mexico courts. Appellants' Br. 84-88. The New Mexico law remains only to be applied, not

interpreted. Thus there are no special circumstances which would justify the delay and expense to the Hoopers which would result from this Court declining to decide the severability of the residency requirement if it is found invalid. Kusper v. Pontikes, 414 U.S. 51, 54 (1973).

CONCLUSION

For the foregoing reasons and those set forth in appellants' brief,, the relief previously requested by appellants on pages 89-90 of that brief should be granted.

Respectfully submitted,

Alvin Dillard Hooper
Counsel of Record
1712 Pedregoso Pl., SE
Albuquerque, NM 87123
(505) 844-8900

Harold L. Folley
1743 Soplo, SE
Albuquerque, NM 87123

"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION

VOL. CXXII . . No. 42,004 NEW YORK, WEDNESDAY, JANUARY 24, 1973 15 CENTS

VIETNAM ACCORD IS REACHED; CEASE-FIRE BEGINS SATURDAY; P.O.W.'S TO BE FREE IN 60 DAYS

THIEU IS CAUTIOUS

Says the Agreement Doesn't Guarantee Lasting Peace

Transcript of the Speech by President on Vietnam

TROOPS TO LEAVE

On TV, Nixon Asserts 'Peace With Honor' Is Aim of Pact

CONGRESS UNITED IN VOICING RELIEF

Some Worry Is Expressed on Prospects of Peace by Cease of War

"All the News That's Fit to Print"

The New York Times

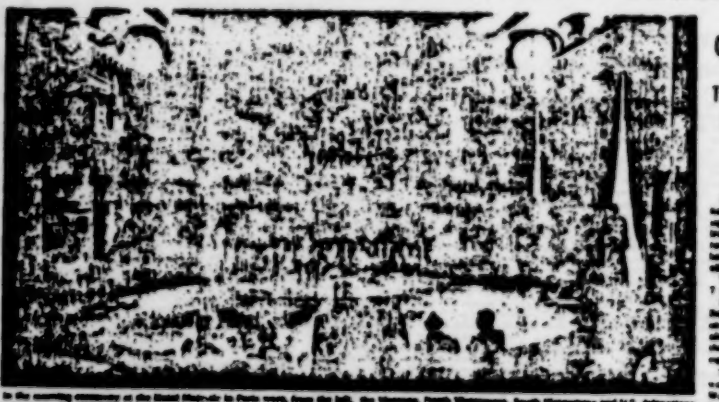
LATE CITY EDITION

VOL. CXXII . . No. 42,200 NEW YORK, SUNDAY, JANUARY 28, 1973 10 CENTS

VIETNAM PEACE PACTS SIGNED; AMERICA'S LONGEST WAR HALTS

Nation Ends Draft, Turns to Volunteers

Change Is Ordered Six Months Early—Youths Must Still Register



CEREMONIES COOL

Two Sessions in Paris Formally Conclude the Agreement

Hanoi Lists of P.O.W.'s Are Made Public by U.S.

The Toll: 12 Years of War

BATTLES CONTINUE AFTER CEASE-FIRE

"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION

VOL. CXXII ... No. 42,009 NEW YORK, FRIDAY, MARCH 30, 1973 15 CENTS

U.S. Forces Out of Vietnam; Hanoi Frees the Last P.O.W.

War Role Is Ended After Decade of Controversy

Thousands Watch 67 Prisoners Depart

PRESIDENT WARNS HANOI TO COMPLY WITH TRUCE PACT

NIXON SETS MEAT PRICE CEILINGS AT BOTH WHOLESALE AND RETAIL; ASSERTS COSTS 'SHOULD GO DOWN'

McCord Testifies His Fellow Plotters Linked High Nixon Aides to Watergate

ACTS TO STOP RISE

He Will Ask Authority to Cut or Suspend Food Import Curbs

NO-STRIKE ACCORD REACHED ON STEEL

S.E.C. White Paper Seeks Stock Market-Restructure

CONSUMERS RALLY FOR MEAT BOYCOTT